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Gendering of Development Data in India: Beyond the Binary #1

Introduction, Research Method, and Summary of Findings

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Author: **Brindaalakshmi.K**

Editor: **Sumandro Chattapadhyay**

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Please read the full report here:

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1. Introduction

India is often represented as a country that has historically acknowledged and accepted individuals who identify as transgender,¹ outside the binary genders of female and male.² However, these individuals were not granted equal citizenship and have mostly existed at the fringe of the society.³ Even with this supposed acceptance, the understanding of a transgender individual has been often confused with that of an intersex individual, or someone born with both female and male genitalia.⁴ This state of transgender individuals has continued even into the modern times.⁵ They continue to struggle for social and economic inclusion, especially equal citizenship in the country.⁶ The understanding of many transgender individuals identifying within the binary genders of female and male has been a relatively recent phenomenon i.e. an assigned female sex at birth individual identifying as a man or an assigned male sex at birth individual identifying as a woman, given the historical precedent of individuals from the traditional hijra/thirunangai communities⁷ tending to identify as a third gender. Further, even many working within Non-governmental Organisations (NGOs) for the transgender community in India do not understand the difference between gender and sexuality.

They do not understand various identities, they do not understand queer identities, they do not understand difference between gender and sexuality. For them to call a 'gay person' as 'trans'

¹ An umbrella term for people whose gender identity differs from the sex they were assigned at birth. The term transgender is not indicative of gender expression, sexual orientation, hormonal makeup, physical anatomy, or how one is perceived in daily life. For details, please visit: <http://www.transstudent.org/definitions> <http://www.transstudent.org/definitions/>

² John, D. (2017). *Living a Life of Exclusion: Being a Transgender in Modern India*. Fokus Menschenrechte 09/17. Friedrich-Naumann-Stiftung für die Freiheit. Retrieved from <https://fnst.org/sites/default/files/uploads/2017/11/20/focuahumanrights-rightsoftransgenderinindia-donajohn.pdf>

³ Ibid.

⁴ 'Intersex' is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn't seem to fit the typical definitions of female or male. For details, please visit: http://www.isna.org/faq/what_is_intersex

⁵ See footnote 2.

⁶ DailyO. (2018, August 13). How India has condemned its transgenders to social exclusion. DailyO. Retrieved from <https://www.dailyo.in/variety/transgender-rights-transgender-bill-2016-transphobia-gender-issues-supreme-court-obcs/story/1/26037.html>

⁷ "Hijras: Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not- men", or "in-between man and woman", or "neither man nor woman". - Supreme Court of India. (2014). NALSA Vs Union of India, 2014. <https://indiankanoon.org/doc/193543132/>

or for them to ask ‘Can a trans person be gay?’ was very surprising for me to know. - Shaman Gupta⁸

Many in NGOs and other persons with other transgender identities also seem to be unaware about trans men due to the lack of recognition of their presence in culturally integrated systems.

The awareness about trans men is negligible because trans men haven’t ever been integrated into cultural systems. It is now that we see them coming up in some of the meetings. So now they have started to understand but it is also only the janta (people) that are there in such meetings, which include hardly few NGOs . If you go out into the city and ask any random trans woman, they will also not know. - Shaman Gupta

National Legal Services Authority (NALSA) Versus Union of India & Others verdict of 2014 acknowledged the right of individuals to self-identify their gender as female, male, or transgender.⁹ With this verdict, the rights of transgender individuals were recognised and the need for equal rights of other citizens of India was acknowledged. The verdict detailed out nine directives to the Central government and all State governments, including framing of social welfare schemes to ensure equal citizenship of transgender individuals in all Indian states. Framing of social welfare schemes and the subsequent fund allocation would require information on transgender persons in the country. The Census of 2011 for the first time enumerated individuals identifying as ‘Other’, apart from ‘Female’ and ‘Male’, which has been taken to represent the transgender persons in the country. However, the validity of the census data under the ‘Others’ category has been questioned by the transgender community.¹⁰

The Sustainable Development Goal 5 (SDG 5) aims to achieve gender equality and empower all women and girls.¹¹ UN Women, in a 2018 report, acknowledges the need for a rights-based approach to data, adhering to international human rights norms and principles in data collection

⁸ Shaman Gupta is a part of TWEET (Transgender Welfare Equity and Empowerment Trust), a community based organisation working for empowerment and welfare of trans persons. The organisation specifically concentrates on providing psycho-social support and guidance to trans masculine persons across India with respect to healthcare, legal changes, education and employment.

⁹ Supreme Court of India. (2014). *National Legal Services Authority (NALSA) Vs. Union of India & Others*. AIR 2014 SC 1863. Retrieved from <https://main.sci.gov.in/jonew/judis/41411.pdf>

¹⁰ Ministry of Social Justice and Empowerment, Government of India. (2013). Annexure 1: Minutes of Consultation meeting on the issues relating to Transgender held on 23rd August 2013 at conference Hall, Central Secretariat Library, G Block, Shastri Bhawan, New Delhi. In *Report of the Expert Committee on the Issues relating to Transgender Persons*. Page 7. Retrieved from <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>

¹¹ United Nations. (2019). *Progress of Goal 5 in 2019*. Retrieved from <https://sustainabledevelopment.un.org/sdg5>

and data dissemination processes.¹² It details out six tenets namely participation, disaggregation, self-identification, transparency, privacy and accountability as the guiding principles for any data collection and dissemination process. This report says that a person's gender identity may or may not correspond with their biological sex. It also states the need for data on gender identity for comprehensive and effective monitoring of SDGs.

Currently, there is no international standard for collecting and measuring gender identity data says the 2018 report by UN Women. The current data sets, therefore, operate with certain hidden biases towards an already marginalised section of the population who face diverse forms of discrimination and even violence. This is continuing to cause further marginalisation of those who are vulnerable to discrimination and inequality because they identify outside the binary genders of female and male. UN Women in this report, further highlights the importance of a statistical standard for gender identity since it is likely to assist in ensuring that policies and public services are inclusive of the specific needs of those who are gender-diverse.¹³

Across the different global development data efforts to bridge the gender gap - such as SDG 5,¹⁴ Human Development Report 2019,¹⁵ and Data2X¹⁶ - it appears that transgender identities are presently only included within the umbrella of LGBTI in different development contexts and not considered as a gender identity while assessing gender gap. Historically, the data on trans feminine individuals had been conflated within the category of MSM (men who have sex with men) for HIV treatment and prevention.¹⁷ This leads to limited access to availability of trans-friendly health services to transgender persons due to lack of this distinction between gender identity and sexual orientation.¹⁸ Sexual orientation and gender identity are two distinct

¹² UN Women. (2018). *Turning Promises Into Action: Gender Equality in the 2030 Agenda for Sustainable Development*. Page 64. Retrieved from <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf>

¹³ UN Women. (2018). *Turning Promises Into Action: Gender Equality in the 2030 Agenda for Sustainable Development*. Retrieved from <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf>

¹⁴ United Nations. (2019). SDG5: Gender Equality. Retrieved from <https://in.one.un.org/page/sustainable-development-goals/sdg-5/>

¹⁵ UNDP. (2019). *Human Development Report 2019*. Retrieved from <http://hdr.undp.org/sites/default/files/hdr2019.pdf>

¹⁶ Data2X. (2019). What is gender data? Retrieved from <https://data2x.org/what-is-gender-data/>

¹⁷ Perez-Brumer, A. G., Oldenburg, C. E., Reisner, S. L., Clark, J. L., & Parker, R. G. (2016). Towards 'reflexive epidemiology': Conflation of cisgender male and transgender women sex workers and implications for global understandings of HIV prevalence. *Global Public Health*, 11(7-8), 849-865. <https://doi.org/10.1080/17441692.2016.1181193>

¹⁸ Burgess, C., Kauth, M. R., Klemm, C., Shanawani, H., & Shipherd, J. C. (2019, June). Evolving Sex and Gender in Electronic Health Records. *Federal Practitioner*, 36(6), 271-277.

data categories and both these data sets have to be dealt with differently¹⁹. There's a need to explicitly separate the data category of *gender identities* from that of *sexual orientations* in the context of inclusion of gender-diverse people, including but not limited to those who identify beyond the gender binary of *female* and *male*, in the efforts towards sustainable development of all.

In 2006, the Government of India approved the National E-Governance Action Plan for the digitisation of different government processes including income tax, issuing passport and other identity documents to create citizen centric environments.²⁰ The acknowledgement of an individual's citizenship has been by means of different identity documents. It is with these documents in their preferred name and gender that a person gets into the system and consequently into different development data, needed to determine eligibility for government welfare schemes. Ten years later, NALSA verdict was passed for the inclusion of transgender individuals in different spaces and development programmes and services. Even with the government's attempt to create more citizen-centric environments with digitisation, transgender persons have been facing challenges with respect to procuring any identity document in their preferred name and gender.²¹ Besides, different states seem to be at different stages of progress with respect to the inclusion of transgender individuals.²² Five years after the NALSA verdict, the transgender community in India continues to face exclusion of varying degrees on different fronts.

The situation of transgender persons in India has further worsened with the recent legislations passed in the country. In 2019, despite severe opposition from the transgender community,²³ the Government of India passed the Transgender Persons (Protection of Rights) Act of 2019,

¹⁹ LGBTFunders. (2019). *Data Collection*. Retrieved from <https://lgbtfunders.org/resources/best-practices-for-foundations-on-collecting-data-on-sexual-orientation-and-gender-identity/>

²⁰ Ministry of Electronics and Information Technology, Government of India. (2018). *National e-Governance Plan*. Retrieved from <https://meity.gov.in/divisions/national-e-governance-plan>

²¹ Samanwaya, R. (2018, March 21). Transgenders cite identity issues to oppose Aadhaar Act in SC. *Economic Times*. <https://economictimes.indiatimes.com/news/politics-and-nation/transgenders-cite-identity-issues-to-oppose-aadhaar-act-in-sc/articleshow/63390738.cms?from=mdr>

²² Human Rights Law Network. (2018, February 14). *Meeting Report - Symposium on Legal Support for Accessing Transgender Rights*. New Delhi. Retrieved from <https://hrln.org/wp-content/uploads/2018/05/Transgender-Consultation-Report.pdf>

²³ Lalwani, V. (2019, November 27). What next for transgender people, as India clears a bill that activists call "murder of gender justice"? *Quartz India*. <https://qz.com/india/1756897/indias-transgender-rights-bill-disappoints-the-lgbtq-community/>

retracting from the rights conferred by the Indian Constitution to its people.²⁴ Additionally, with the passing of the Citizenship Amendment Act 2019, the transgender community fears further exclusion due their inability to prove their identity and consequently their citizenship, affecting their access to basic human rights.²⁵

Clarifying the often mistakenly interchanged use of *sex* and *gender* in scientific literature, health policy, and legislation, World Health Organisation defines gender as a term that “describes those characteristics of women and men that are largely socially created, while ‘sex’ encompasses those that are biologically determined.”²⁶ Data2X explains that gender data is data that “is collected and presented by sex as a primary and overall classification.”²⁷ Gender disaggregated data, thus, is possible only when there is gender data i.e., when collected data includes sex as a primary and overall classification. However, global development data collection efforts at present, even when collected and presented by sex (of the data subjects), leaves out individuals whose gender identity is different from the gender of their assigned sex at birth or who do not identify within the gender binary. This *gender-disaggregated data* therefore does not reflect the reality of all gender minorities and cannot be used to make development decisions, especially for the inclusion of transgender and intersex persons, who are often misrepresented or absent in this data. In this report, gendering of development data refers to the way in which (binary) *gender* as a data category directs collection of data only of individuals who identify with the gender of their assigned sex at birth, and the implications of that on development decisions for transgender individuals or individuals who do not identify with the gender of their assigned sex at birth. Gendering of development data including but not limited to official statistics, affects the access to rights and welfare by transgender and intersex persons. In India, development data collected and presented in the binary genders of female and male is used to deliver welfare to citizens and this affects the rights of transgender persons.

Given this situation of transgender persons in India, this report seeks to understand the gendering of development data in India, collection of data and issuance of government (foundational and functional) identity documents to persons identifying outside the cis/binary genders of female

²⁴ Gandhi, D., & Ghia, U. (2019). A Constitutional Challenge to the Transgender Persons Act in India. I-CONnect. Retrieved from:

<http://www.iconnectblog.com/2019/12/a-constitutional-challenge-to-the-transgender-persons-act-in-india/>

²⁵ PTI. (2020, January 04). CAA: Transgenders, Queers ask how will we prove lineage. Deccan Herald. <https://www.deccanherald.com/national/national-politics/caa-transgenders-queers-ask-how-will-we-prove-lineage-791276.html>

²⁶ WHO. (2019). Gender Definitions. Retrieved from <https://www.who.int/genomics/gender/en/>

²⁷ Data2X. (2019). What is gender data? Retrieved from <https://data2x.org/what-is-gender-data/>

and male, and the data misrepresentations, barriers to accessing public and private services, and informational exclusions that still remain.

This report is organised in four parts:

- **Part 1** of the report, that is this document, offers an introduction to the report, describes the method of the study, and presents a summary of the findings.
- **Part 2** looks at the history of enumeration and legal processes and legislations related to transgender people in India, challenges with the implementation of NALSA verdict of 2014, critique of the Transgender Persons (Protection of Rights) Act 2019, and data discrepancies with respect to Census 2011.
- **Part 3** delves into identity documents for transgender persons, the recording of (preferred) name and gender on identity documents, the difficulties of changing such recorded data, and implications of the same for transgender persons when accessing welfare services.
- **Part 4** document shows how the respondents of this study assess the opportunities - as well as the inherent risks - created by digital technologies, and big data generated by the same, for transgender persons to be more effectively enumerated and represented in datasets that determine access to development programmes.

2. Research method

This study of development impacts of official data and statistics collected (and otherwise) from transgender persons in India begins with a focus on the inherent assumption that large-scale data sets are the best available reference points for designing development solutions. Kate Crawford calls this ‘data fundamentalism’ in the article titled *The Hidden Biases of Big Data*.²⁸ She describes ‘data fundamentalism’ as the notion that sees massive data sets and predictive analysis as always reflecting the objective truth. Crawford questions this notion by stating that data and data sets are human creations and hence are bound to carry hidden biases, both during collection and analysis. Data systems can also contribute to removing inappropriate human biases and consequent discrimination if designed using the principle of ‘equal opportunity by design,’ notes the *Big Data: A Report on Algorithmic Systems, Opportunity and Civil Rights* report by Government

²⁸ Crawford, K. (2013, April 1). *The Hidden Biases of Big Data*. Harvard Business Review. Retrieved from <https://hbr.org/2013/04/the-hidden-biases-in-big-data>

of USA.²⁹ The report acknowledges the assumption of objectivity of big data techniques due to sheer scale of the data. It specifically highlights the possibility of discriminatory outcomes if historical biases or blind spots are not taken into account within the algorithm used.

Development data, including official statistics and data used for specific development programmes, collected and presented in the binary genders of female and male is used to deliver welfare services to all Indian citizens, including those who do not identify within the gender binary. Therefore, an understanding of the gendering of development data and resultant exclusion of transgender and intersex persons in India would require a study of the enumeration processes and data collection initiatives. With this in mind, a qualitative study was designed to understand the different aspects namely history of transgender and intersex persons' inclusion in India, enumeration of transgender and intersex persons into development data, digitisation of identity documents, development data as big data, among others. Experts from northern, southern, eastern and western parts of India, associated with different organisations working with the transgender community in the country were interviewed for this study.

A total of 19 individuals were interviewed for this study during October-December 2018. The identified respondents have played and continue to play important roles in struggles of transgender persons in India for their dignity, social justice and citizenship. The respondents included individuals who are researchers, legal professionals, and activists/individuals associated with different organisations that work on the rights of transgender persons at the state, regional, and national levels. This set of organisations and individuals associated with them are not representative of all transgender rights organisations in India, and neither have they engaged with every transgender rights issue. See Appendix (page 16) for the list of respondents with description of their works and the organisations they are associated with. Semi-structured interviews were undertaken with the respondents either in person or via telephone, and recorded. Relevant sections of the questionnaire can be found in parts 2-4 of this report.

As a respondent noted, there is insufficient information with respect to intersex individuals in India and their enumeration into the development data in India.

Historically, intersex people have not been allowed to self identify. Intersex people have been assigned a sex literally at birth, sometimes with the help of a surgeon. If they have ambiguous genitalia, the doctor would say that the person will not adjust successfully as a man. So let's chop it off and create a vulva and tell the parent that the person is a girl. So doctors have historically assigned the sex even surgically and the person would have been reared as gender

²⁹ Executive Office of the President, Government of the United States of America. (2016, May). *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights*. Retrieved from https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf

female. They may have other syndromes like klinefelter syndrome and external anatomy more or less typical for a male who has been cisgender male. One thing to remember is not all intersex people consider themselves as transgender or want to identify as anything other than cisgender. - Dr. L. Ramakrishnan³⁰

The structural challenges faced by transgender individuals in accessing rights and services due to government and private sector generated big data is an important part of this study. The insights on the structural challenges and the different layers of discrimination a transgender individual faces with respect to various markers of marginalisation/privilege, such as religion, caste, formal education, income, etc. were discussed and identified through the interviews with individuals working on the rights of transgender persons - within the limited scope of this study.

The interviews for this study were conducted in late 2018 and this report was completed in the beginning of 2020, after India went through an extended national debate on and finally enactment of the Transgender Persons (Protection of Rights) Act during 2019. Although being published in June 2020, this report presents the discussions had with the respondents in the context of events with respect to the rights of transgender persons in India til December 2019.

The Transgender Persons (Protection of Rights) Act, 2019 has been severely criticised by the transgender community, human rights activist groups³¹ and even opposition political parties³² in India for several reasons.³³ The criticisms include not establishing reservation in employment and education for transgender people and mandating Sex Reassignment Surgery (SRS) as necessary to be identified within the binary genders of female and male, among others. At the time of publication of this report, India is going through an extended national lockdown due to the global outbreak of the COVID-19 pandemic. Even with the announcement of government's relief packages, the transgender and intersex community has been unable to completely access them due to the lack of proper enumeration of transgender individuals combined with their lack of identification documents in their preferred name and gender. This has brought the working class transgender individuals under severe mental and physical distress.

³⁰ Dr. L. Ramakrishnan is a public-health professional working with the NGO SAATHII. His areas of focus are advocacy and capacity-building towards strengthening access to healthcare and legal services for LGBTI+ and populations affected by HIV/AIDS.

³¹ Knight, K. (2019, December 05). India's Transgender Rights Law Isn't Worth Celebrating. Human Rights Watch. Retrieved from <https://www.hrw.org/news/2019/12/06/indias-transgender-rights-law-isnt-worth-celebrating>

³² Dharmadhikari, S. (2019). Trans Bill 2019 passed in Lok Sabha: Why the trans community in India is rejecting it. The News Minute. August 05. Retrieved from <https://www.thenewsminute.com/article/trans-bill-2019-passed-lok-sabha-why-trans-community-india-rejecting-it-106695>

³³ Editorial. (2018, December 20). Rights, revised: on the Transgender Persons Bill, 2018. The Hindu. Retrieved from <https://www.thehindu.com/opinion/editorial/rights-revised/article25783926.ece>

Additionally, amidst the global lockdown, the Government of India also released the draft of the rules of the Transgender Persons (Protection of Rights) Act for feedback. Further, the community was initially given only 12 days' time to submit their feedback, inconsistent with the Pre-Legislative Consultation Policy (PLCP) 2014 that mandates a 30 day window for feedback.³⁴ The draft rules in the version released on April 18, 2020 continue to be in violation of the NALSA verdict. It denies an individual's right to self-identify their gender as male, female or transgender without a certificate for a Sexual Reassignment Surgery.³⁵ Given the stigma around being transgender, the mandatory requirement for any individual to first identify as Transgender on their Certificate of Identity to change their name and gender before changing to a binary gender, will further discourage individuals from disclosing their identity. In essence, the discriminatory new law and its rules will further aggravate and worsen the situation of the transgender persons in the country, with respect to their enumeration and consequently, their access to their constitutionally guaranteed human rights.

Although this report does not include an analysis of the rules of the Transgender Persons (Protection of Rights) Act of 2019, the observations and insights shared through the interviews and presented in this report, we hope, continue to remain relevant to and inform ongoing struggles by transgender persons for social justice and economic well being.

3. Summary of findings

Globally, discussion of *gender* in the context of *development data* is still framed within the binary of *female* and *male*. Even with the intent of Sustainable Development Goals to *leave no one behind*,³⁶ the dominant binary gender data conversation is in fact leaving people behind, especially those who do not identify within the gender binary. Currently there is no international standard for collecting and measuring gender identity data, states a 2018 report by UN Women.³⁷ Development

³⁴ Counterview. (2020, April 20). Transgender community 'shocked' at timing, manner of seeking feedback on draft rules. Counterview. Retrieved from: <https://www.counterview.net/2020/04/transgender-community-shocked-at-timing.html>

³⁵ Singh. P, Shankar. G (2020, May 05). Modi govt releasing draft rules on Transgender Persons Act in lockdown a blow to community. The Print. Retrieved from: <https://theprint.in/opinion/modi-govt-releasing-draft-rules-transgender-persons-act-lockdown-a-blow/414331/>

³⁶ UN Statistics (2016). *The Sustainable Development Goals Report 2016*. United Nations Statistics. Retrieved from: <https://unstats.un.org/sdgs/report/2016/leaving-no-one-behind>

³⁷ UN Women. (2018). *Turning Promises Into Action: Gender Equality in the 2030 Agenda for Sustainable Development*. Retrieved from <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2018/sdg-report-gender-equality-in-the-2030-agenda-for-sustainable-development-2018-en.pdf>

data available at present, therefore, operate with inherent biases against an already marginalised section of the population who face diverse forms of discrimination and even violence. **Thus, India's efforts to produce development data (including official statistics, data collected for specific welfare programmes, and private big data) that records gender of data subjects within the binary of *female* and *male*, is only reflective of the current state of global approaches to development data.**

This study, titled *Gendering of Development Data in India: Beyond the Binary*, describes and highlights the implications of this binary gendering of development data on transgender and intersex persons in India. **Through the course of this study and given the responses from the participants interviewed, it is evident that the transgender community faces several data challenges with respect to enumeration and identification systems, which in turn prevents them from accessing different services.** Digitisation has, in fact replicated the existing challenges within offline systems and has further accentuated their challenges in many instances instead of solving the existing issues. Some Indian states have a screening committee to issue Transgender Identity Cards to transgender individuals. These Cards are then used as a reference to change details on other identity documents. Transgender individuals are often subjected to horrific human right violations by the screening committee due to the need to prove their identity. Digitisation has not removed these human rights violations to make it easier for transgender individuals to self-identify in their preferred name and gender on government-issued identity documents, and therefore on official statistics.

There are significant issues with respect to enumeration of transgender population in India for purposes of producing official statistics and data on the basis of which development programmes are planned. **Transgender people have not been consulted to understand if and how they would want to be represented in the data. Neither were they used as enumerators for collecting data from the community members.** The national Census of 2011, for the first time in India's history, allowed citizens to self-identify as a third gender category ('Other') beyond the binary of female and male.

Although data from Census 2011 is being used as the primary official statistics for fund allocation across different states for transgender people's inclusion into development programmes and services, it recorded only a minority of the actual transgender population in India. **This is leading to misallocation and under-allocation of funds for development priorities of transgender persons across Indian states.**

This access gap further widens when individuals do not own identification documents in their preferred name and gender. Prior to the passing of the Transgender Act of 2019, there was no standardised single process for transgender individuals to change their name and gender across

different identity documents, through either offline or online means. So far, transgender persons have either sought the support of the legal system to help them with these processes or have repeated the process followed by others who have done so, in the absence of a singular process and government assistance for the same. It requires them to personally engage with the government departments and officials concerned. **Engaging with government officials becomes a challenge for most due to the stigma attached to being transgender.** Not all government officials have been sensitised about the rights and concerns of transgender citizens, though the NALSA verdict was given in 2014.³⁸

The Supreme Court of India, for the first time in Indian history, recognised the right of every individual to self-identify their gender as female, male, or transgender in its verdict to the NALSA Vs. Union of India and Others case. **Many government officials, however, do not consider the NALSA verdict as an official order to be followed. Not all states offer 'Transgender' as a category of response for the question about gender on application forms for public services.** Though NALSA verdict of 2014 recognised self-identification of an individual's gender, many states continue to demand Sex Reassignment Surgery (SRS) from individuals who identify (on government-issued identity documents and statistics) within the binary genders of female and male. SRS is not an option for all due to costs and medical conditions of several transgender individuals. This further jeopardises the possibility of procuring identification documents in their preferred name and gender. Access to health insurance is not an option for all due to the lack of identification documents and lack of insurance coverage for SRS.

Due to above mentioned reasons among others, many transgender persons are compelled to retain their identity documents in their given name and gender. Multiplicity of identity documents of transgender people is structurally produced and is not a symptom of bad/fraudulent data collection process. **The welfare system in India has not been structured or equipped to be inclusive of transgender persons i.e individuals who don't identify with the gender of their assigned sex at birth or who identify outside the gender binary.** This structural problem is instead being seen as a symptom of an inefficient data collection process by the Government of India increasing the emphasis on data collection instead of a systemic change of planning, delivery, and monitoring of welfare services. This emphasis on data collection is a 'hidden bias' that assumes the efficiency of a non-inclusive system without considering its shortcomings.

Most welfare programmes are not fundamentally inclusionary. **Most states have made little to no effort at consulting the transgender community with respect to understanding their**

³⁸ Supreme Court of India. (2014). *National Legal Services Authority (NALSA) Vs. Union of India & Others*. AIR 2014 SC 1863. Retrieved from <https://main.sci.gov.in/jonew/judis/41411.pdf>

needs and challenges. Further, even when consulted, their inputs have not been fully taken into consideration while designing programmes targeting the transgender community.

This further accentuates the challenges due to the lack of clarity with respect to prioritisation of welfare service for transgender persons by different government bodies. **State governments across India continue to focus on the need for enumerating transgender persons as part of official statistics instead of making all welfare programmes inclusive of transgender persons based on human rights, independent of numbers.** It is evident that welfare programmes and services are not designed inclusive of transgender persons, and they do not enable them to step forth and claim their rights without fear.

This systematic exclusion of transgender people is not one that is limited to the public sector and services. **The private sector has made no exceptional efforts to include transgender persons with respect to data collection or catering to their needs.** However, it definitely contributes to breach and abuse of personal data of users, irrespective of gender. Surveillance is a serious concern of the transgender community while using social media and connected services. Popular social media platforms offer the community the freedom to express their gender identity but at the price of disclosing their identity to third parties without informed consent or effective control over how such personally identifiable information may be used by third parties. Private sector services definitely need to be more responsible towards, both including and using the data of transgender people, a historically marginalised population group.

That said, there is an urgent need for more sensitive systems especially for data collection with respect to an already marginalised group like the transgender community. Digital systems need to be more responsible towards preventing replication of existing challenges faced by a marginalised group to avoid further marginalisation. **The onus seems to be on the transgender person to prove their identity to be able to access their rights, the lack of which has resulted in the erasure of their existence as individuals and as a population group.** This process is being further accelerated with the passing of regressive laws like the Citizenship Amendment Act and the Transgender Persons (Protection of Rights) Act.

Presently, the emphasis continues to be on designing digital systems that collect data, from both the government designed public services and private services, and especially on automation of such data collection. The present design and structure of the welfare system in India, however, is non-inclusive of transgender persons. **This systemic flaw of the welfare system makes it necessary for transgender people to repeatedly prove their identity at different points to claim their right to equal citizenship in the country, which more often than not results in compromises with no guarantees for the sake of being represented on official statistics and government records.** This data collected by a structurally flawed system is indicative of neither the reality nor the causes of exclusions faced by the transgender persons in the country, but is a

clear sign of ‘data fundamentalism’. The prioritisation of the need for data, to enable development interventions, has led to the state sidestepping its responsibility to address the needs and human rights of its citizens.

Building on the work of Dr. Usha Ramanathan, a renowned human rights activist, I say that data collection and monitoring systems that tag, track, and profile transgender persons placing them under surveillance, have consequences beyond the denial of services, and enter into the arena of criminalising for being beyond the binary.³⁹ The vulnerabilities of their gender identity exacerbates the threat to freedom. **With their freedom threatened, expecting people to be forthcoming about self-identifying themselves in their preferred name and gender, so as to ensure that they are *counted* in data-driven development interventions and can thus access their constitutionally guaranteed rights, goes against the very idea of sustainable development and human rights.**

³⁹ Ramanathan. U. (2014, May 02). Biometrics Use for Social Protection Programmes in India Risk Violating Human Rights of the Poor. UNRISD. Retrieved from <http://www.unrisd.org/sp-hr-ramanathan>

Appendix: List of respondents

Amrita Sarkar has been involved with transgender activism for two decades and she has also been involved in numerous capacity building initiatives for transgender communities at the national and international level. She is one of the founding members and the Secretary of IRGT – A Global Network of Trans Women and HIV. She is an active member of TPATH (Transgender Professional Association for Transgender Health). She has made two films on transgender issues and those have been screened at various platforms. She is a trained counsellor and has completed her post graduation in social welfare. Amrita is currently working with Solidarity and Action Against The HIV Infection in India (SAATHII). At SAATHII she is leading a project titled 'Samata', focused on improving access of LGBTIQ+ communities to inclusive services in the field of health, education, legal aid and livelihood in the Delhi National Capital Region (NCR). SAATHII, a Non-profit organization registered in 2002, works towards Universal access to healthcare, justice, and social welfare for socio-economically marginalized women and children, communities impacted by the HIV/AIDS epidemic, and groups marginalized on account of their sexuality and/or gender identity in India. At present, SAATHII operates through its 12 state offices overseeing operations in 400+ districts across the 28 states and 9 UTs of India. For more information, visit www.saathii.org.

Aparna Banerjee, a hijra activist working for the sexual minorities and gender nonconforming people since 2000, remained a member of the State Transgender Development Board (West Bengal) and contributed to the state figures and welfare measures and believes in equity rather than equality.

A.Revathi is a writer and activist working for the rights of gender and sexual minorities.

Bittu Karthik is a biologist and a genderqueer transman, from THITs. THITs is an unfunded, unregistered mass organisation of transgender, hijra and intersex activists from across Telangana.

Delfina is an activist, playback theater artist, and social worker. They are associated with Nirangal, an organization based in Chennai, Tamil Nadu, India, which works for the rights and welfare of those with alternate gender and sexual identities. They have presented papers or led workshops at over a dozen university and college conferences and seminars in South India during the course of the last three years. They are also a coauthor of about half a dozen papers published in international journals like Studies in Family Planning, Women's Reproductive Health, and International Journal of Sexual Health.

Ditilekha Sharma is a queer researcher-activist.

Grace Banu is a dalit and transgender activist and writer. She is the Founder Director of Trans Rights Now Collective.

Jaya as General Manager of Sahodaran, manages multiple projects across 2 locations in Chennai concerned with HIV prevention among gay, bi men and trans women and also plays a key role in organising city-wide and state-wide LGBT visibility events through the Chennai Rainbow Coalition and the Tamil Nadu Rainbow Coalition (respectively). Sahodaran, established in 1998 by Dr. Sunil Menon.C, Founder and Director, is the first Community Based Organization in Chennai run by and for the MSM community. Although focused primarily on MSM, since 2010, Sahodaran has fostered CBOs catering to the needs of TGs (transgender women), and begun to serve as a referral point for LGBT community members more broadly.

Dr. L. Ramakrishnan is a public-health professional working with the NGO SAATHII. His areas of focus are advocacy and capacity-building towards strengthening access to healthcare and legal services for LGBTI+ and populations affected by HIV/AIDS. SAATHII, a Non-profit organization registered in 2002, works towards Universal access to healthcare, justice, and social welfare for socio-economically marginalized women and children, communities impacted by the HIV/AIDS epidemic, and groups marginalized on account of their sexuality and/or gender identity in India. At present, SAATHII operates through its 12 state offices overseeing operations in 400+ districts across the 28 states and 9 UTs of India. For more information, visit www.saathii.org.

Maya Sharma is a feminist, queer activist and a writer in English and Hindi. She is the co-author of the book on single women in Hindi titled *Kinaroe Peh Ugathi Pechan*. published in 1996 Later she wrote the book *Loving Women: Being Lesbian in Unprivileged India*, published in 2006. Currently, she works with Vikalp (Women's Group) in Vadodara, founded in 1996. As a community based organization it attempts to bring issues of vulnerable women to the fore and seek resolutions through articulation and protection of their rights. In 2003, through organizational response to issues on the ground and the the larger queer and the women's movements it began to work with LBT people across Gujarat.

Pawan Dhall has been engaged with gay, lesbian, bisexual, transgender and other queer community mobilization in eastern and other parts of India since the early 1990s. He was a founder member of Counsel Club (1993-2002) and Pravartak (1991-92, 1993-2000), among the first queer support forums and publications in India. He studied economics in college, and worked as a journalist, copywriter and social communicator in his early years as a professional. From 2002-2014, he worked with SAATHII (www.saathii.org), an NGO that promotes universal access to health and social justice, as part of the top-level management. He now leads Varta Trust, a Kolkata-based gender and sexuality publishing, research, advocacy and training non-profit agency (www.vartagensex.org). His association with Varta Trust enables him to take up social research,

journalistic writing, training and advocacy initiatives on queer health, legal and socio-economic inclusion issues.

Rebina Subba is a social justice lawyer working with marginalized communities since 2008. She is the founder of 'Shamakami – One Who Desires One's Equal,' the only registered organization working on LGBTQI issues in Shillong. She has been working to make people aware of sexuality and gender issues. She is a former member of the Meghalaya State Commission for Women. Rebina has carried across the message to incorporate trans-activism into women activism as trans-issues are women issues and feminists should support in protecting all people, from both sex and gender discrimination. The umbrella of Shamakami runs a legal unit, Legal Rights Forum, with a small collective of lawyers who advocate for the rights and dignity of the LGBTQI population and render legal services to the marginalized population with special focus on people living with HIV and people with special challenges.

Sankari, along with **Siva**, co-founded Nirangal. She has over a decade of experience in advocacy and crisis intervention for communities of diverse gender and sexual identities and is well known among the activist groups in Chennai. Sankari was the first trans woman in Tamil Nadu to receive training on principles of counseling from a professional trainer. She also uses theater and performing arts to promote understanding and acceptance of marginalized communities. She has also been a part of various national level consultations on the transgender bill.

Sivakumar, along with **Sankari**, co-founded Nirangal. He has over a decade of experience in advocacy and crisis intervention for communities of diverse gender and sexual identities and is well known among the activist groups in Chennai. While Siva takes up key responsibilities for organizing Chennai LGBT Pride every year, he also identifies as a feminist and Dalit rights activist.

Shaman Gupta is a part of TWEET (Transgender Welfare Equity and Empowerment Trust), a community based organisation working for empowerment and welfare of trans persons. The organisation specifically concentrates on providing psycho-social support and guidance to trans masculine persons across India with respect to healthcare, legal changes, education and employment.

Swati Bidhan Baruah is an advocate practising in the Guwahati High Court. Swati is a transgender rights activist from Assam and is a Founder of the All Assam Transgender Association. She is the first transgender person in India to be appointed as a judge to the Lok Adalat in Guwahati. Swati filed one of the first cases in India seeking permission from the court to undergo sex reassignment surgery. She also filed an intervention application in the Honourable Supreme Court against the biased nature of the National Register of Citizens. Moreover, she also filed an intervention application in the matter of setting up a Human Rights Court in the Indian

Supreme Court. She has filed several petitions before the Guwahati High Court and also in the Supreme Court of India and for protection of rights of transgender persons in Assam and the North-East. She also filed a PIL in the Guwahati High Court challenging the Ayushman Bharat for accommodating transgender persons under the said scheme.

Vihaan Peethambar is a Board Member of Queerala, an LGBTIQ+ Organization (Kerala).

Queerala is a Community Based Organization for Malayali LGBT+ people, focused on advocacy of Sexual Orientations and Gender Identities to create and advance safe spaces for LGBT+ people in Kerala. We aim for a society free of discrimination against queer people by creating awareness about LGBT+ lives engaging with the government, media and other institutions.

Vyjayanti Vasanta Mogli Is a Transgender RTI Activist & Co-founder, Queer Swabhimana Yatra (QSY) & Telangana Hijra Intersex Transgender Samiti (THITS).



BIGDATA
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Gendering of Development Data in India: Beyond the Binary #2

Legal Rights and Enumeration Process

June 2020

Author: **Brindaalakshmi.K**

Editor: **Sumandro Chattapadhyay**

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Note

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Please read the full report here:

<https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

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1. Introduction

An understanding of the gendering of development data in India begins with assessing the processes through which state agencies in India undertake the enumeration of transgender people for the purposes of carrying out various activities related to civic governance and provision of development schemes, and the legislations that enable them. This second part of the report offers an overview beginning with the first recorded history of transgender persons' inclusion in enumeration processes in India. It then goes on to understand the subsequent legal processes and legislations that identified the rights of transgender individuals in the country.

This part discusses the different critiques of the legal, legislative, and enumerative processes in India to set the context for understanding the struggles for citizenship and rights of transgender individuals, and the concerns with their representation in different sets of data critical for delivery of welfare services. It specifically discusses the recording of individuals self-identifying beyond the gender binary of *male* and *female* in the national Census of 2011, Supreme Court verdict of 2014 to the National Legal Services Authority (NALSA) Versus Union of India and Others case, and the Transgender Persons (Protection of Rights) Act of 2019.

2. History of legal processes, legislations, and enumeration related to transgender people in India

The first recorded official statistics on transgender people in India can be found in the Census of 2011 released by the Census Department. 4,87,803 individuals self-identifying as 'Other' (than male or female), including 54,584 children, were recorded in the Census 2011.¹ Prior to 2011, there was no official record on transgender people at the national level in India.

The earliest official enumeration of transgender people in any Indian state happened in Tamil Nadu in 2004, when some trans women and one trans man were issued Voter ID cards. Transgender women were issued with 'Transgender' as sex, and the transgender man with 'Male' as sex in their respective Voter IDs, notes Selvam,² the transgender man who was issued a Voter

¹ Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India. Primary Census Abstract Data for Others (India & States/UTs). Retrieved from http://censusindia.gov.in/2011census/PCA/PCA_OTH_0000_2011.xlsx

² Selvam is a transgender rights activist.

ID card as the only exception in 2004. Trans women have also been issued voter IDs³ and included in voters' lists as female even as early as 1993-94, notes A.Revathi.⁴ During this time, the address of hamams⁵ were used as the address to provide voter IDs and ration cards. Ration cards were issued with the head of the hamam as the head of the family. In 1994, the Election Commission recognised the right of transgender persons to vote.⁶ However, the Election Commission recognised only the right of hijras,⁷ one group of transgender persons, to vote.⁸ In 2013, the Election Commission had issued voter ids to transgender persons for the first time.⁹

In 2012, the National AIDS Control Programme IV (NACP IV) recognised transgender people as a separate group to be considered for targeted intervention programmes.¹⁰ It is worth noting that inclusion in the AIDS Control programme did not involve issue of any identification document or inclusion in any enumeration process. Several respondents note that registering with any Non-governmental Organisation (NGO) or Community Based Organisation (CBO) working on HIV was sufficient to become a part of the programme. However, as part of the intake process, the individuals would be classified as transgender or MSM by the NGO/CBO staff, often based on their assumptions, which were based on the individual's attire, affiliation with the hijra/thirunangai culture, operative status, etc.

³ Satyal, A. (2001). *Hijras and the Politics of Empowerment in Contemporary India*. Harvard Asia Quarterly. Retrieved from https://projects.iq.harvard.edu/files/har/files/vol_5.3_summer_2001.pdf

⁴ A.Revathi is a writer and activist working for the rights of gender and sexual minorities.

⁵ Originally, public bath houses which later became a place of stay for transgender people and also for sex work. See: <https://www.dictionary.com/browse/hammam>

⁶ UN News. (2014, May 06). Sexual minorities given right to vote in India's elections. Retrieved from <https://news.un.org/en/audio/2014/05/588452>

⁷ "Hijras: Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not- men", or "in-between man and woman", or "neither man nor woman". - Supreme Court of India. (2014, April 15). National Legal Services Authority Versus Union of India and others. Writ Petition (Civil) No. 400 of 2012 with Writ Petition (Civil) No. 604 of 2013. Indian Kanoon. Retrieved from <https://indiankanoon.org/doc/193543132/>

⁸ Chakrapani, V., & Narrain, A. (2012). Legal Recognition of Gender Identity of Transgender People in India: Current Situation and Potential Options. UNDP India. https://www.undp.org/content/dam/india/docs/HIV_and_development/legal-recognition-of-gender-identity-of-transgender-people-in-in.pdf

⁹ Thomas. S. (2015, March 05). In a first Mumbai Activist's Passport lists sex as transgender. Times of India. Retrieved from <https://timesofindia.indiatimes.com/city/mumbai/In-a-first-Mumbai-activists-passport-lists-sex-as-transgender/articleshow/46460177.cms>

¹⁰ Laxmi T., et al. (2011). Transgender - Hijra Strategy. National AIDS Control Programme IV Working Group. National AIDS Control Organisation. May 05. <http://www.naco.gov.in/sites/default/files/4%20TG%20Strategy.pdf>

Prior to NACP IV, transgender people were included under the umbrella group of MSM (Men who have Sex with Men). Several respondents observe the lack of clarity with respect to the categorisation of individuals as MSM or TG (transgender) under the HIV programmes. Definition of transgender under the AIDS programmes has primarily only indicated trans women or hijras. Trans men are not included under the categories of transgender or MSM, as it is assumed they would be sexually active only with cis women, and not be at risk of acquiring or transmitting HIV.

Even the SACS (State AIDS Prevention and Control Societies) have not mentioned anything specifically about trans men and there is still a common notion that transgender means only trans women. - Amrita Sarkar¹¹

Historically, there have been laws in the different states of India like the Telangana Eunuchs Act of 1919, which allows for surveillance of transgender persons under the pretext of suspicion,¹² Criminal Tribes Act of 1871 and Karnataka Police Act of 1963 that penalised eunuchs (a term that is considered derogatory to address transgender people).¹³

In 2014, for the first time in the history of India, the Supreme Court recognised the right of every individual to self-identify their gender as male, female, or transgender in its verdict to the NALSA Vs. Union of India and Others case.¹⁴ This verdict detailed out nine directives to be followed by the state and central governments in India for the inclusion of transgender individuals in the country. Prior to the NALSA judgement, identification and inclusion of transgender people in HIV programmes has been primarily through Community Based Organisations (CBOs) working on HIV. Since enrolment in any HIV programme was not seen as an enumeration process, being included in these programmes did not include them into a general government database in their preferred name and gender.

¹¹ Amrita Sarkar has been involved with transgender activism for two decades and she has also been involved in numerous capacity building initiatives for transgender communities at the national and international level. She is one of the founding members and the Secretary of IRGT – A Global Network of Trans Women and HIV. Amrita is currently working with Solidarity and Action Against The HIV Infection in India (SAATHII).

¹² Jain, M. (2018). Plea To Declare Telangana Eunuchs Act Unconstitutional As It Violates The Fundamental Rights Of Transgenders: AP HC Issues Notice To State. Live Law. February 28.
<https://www.livelaw.in/plea-declare-telangana-eunuchs-act-unconstitutional-violates-fundamental-rights-transgenders-ap-hc-issues-notice-state/>

¹³ Government of Karnataka. (1963). The Karnataka Police Act, 1963.
[http://dpal.kar.nic.in/pdf_files/4%20of%201964%20\(E\).pdf](http://dpal.kar.nic.in/pdf_files/4%20of%201964%20(E).pdf)

¹⁴ Supreme Court of India. (2014, April 15). National Legal Services Authority Versus Union of India and others. Writ Petition (Civil) No. 400 of 2012 with Writ Petition (Civil) No. 604 of 2013. Indian Kanoon. Retrieved from <https://indiankanoon.org/doc/193543132/>

It is worth noting that several respondents mentioned that the NALSA verdict did not specify the process for change of identification documents to an individual's preferred name and gender. Different states are following different processes for name and gender change in different documents. There is no standardised process prescribed by the central government.

This is a process that lawyers and activists have logically figured out. It has worked in many cases. There is a nuance to this. Actually no government record says even in writing as to how one changes one's name legally. It's been a convention to get one's name changed through an affidavit in the court and the same convention has been adapted for change in gender identity as well. - Pawan Dhall¹⁵

The first state-level Transgender Welfare Board, the Aravani Welfare Board (for trans women), was established in the state of Tamil Nadu in 2008. Subsequently, post the NALSA verdict, the Tamil Nadu government was directed to change the name of the board to Third Gender Welfare Board. However, there is no representation of trans men on the board, notes Jaya.¹⁶ This Aravani Welfare Board was primarily set up to issue transgender identification card to trans women that will enable them to procure other identification documents required to access welfare services in the state.

Since its inception it is called the Trans women's Welfare Board leaving absolutely no scope for dialogue around trans men. After NALSA, it would have been better to rename it as Transgender Welfare Board but since it is dominated by trans women, it was renamed as Moondraam Paalinam Board (Third Gender Welfare Board). - Sivakumar¹⁷

After the NALSA judgement, DMK¹⁸ MP Tiruchi Siva moved a private member's bill in the Rajya Sabha to protect the rights of Transgender people in 2014.¹⁹ Subsequently, in 2015, a modified version of the bill after community consultation, was drafted by the government as The Rights of

¹⁵ Pawan Dhall has been engaged with gay, lesbian, bisexual, transgender and other queer community mobilization in eastern and other parts of India since the early 1990s. He now leads Varta Trust, a Kolkata-based gender and sexuality publishing, research, advocacy and training non-profit agency (www.vartagensex.org).

¹⁶ Jaya as General Manager of Sahodaran, manages multiple projects across 2 locations in Chennai concerned with HIV prevention among gay, bi men and trans women and also plays a key role in organising city-wide and state-wide LGBT visibility events through the Chennai Rainbow Coalition and the Tamil Nadu Rainbow Coalition (respectively).

¹⁷ Sivakumar, along with Sankari, co-founded Nirangal. He has over a decade of experience in advocacy and crisis intervention for communities of diverse gender and sexual identities and is well known among the activist groups in Chennai.

¹⁸ DMK (Dravida Munnetra Kazhagam) is a regional political party from the state of Tamil Nadu, India.

¹⁹ P., Anuvinda, & Tiruchi, S. (2016). A Story of Two Bills. Indian Express. October 28. <https://indianexpress.com/article/opinion/columns/transgenders-persons-bill-rajya-sabha-private-member-bill-3195872/>

Transgender Persons Bill, 2015 and sent to the law ministry. It was then tabled in the Lok Sabha in August 2016 after considerable revision to the 2015 version.²⁰ After rounds of public criticism and government consultations (which were criticised as well), including a 2017 report of a Standing Committee of the Parliament on the draft bill, a new version of the bill was tabled in Lok Sabha, the lower house of Indian Parliament, in December 2018.²¹ The bill, with some changes, was enacted by the Lok Sabha on August 5, 2019 and by the Rajya Sabha, upper house of Indian parliament, on November 25, 2019 as The Transgender Persons (Protection of Rights) Act, 2019.²²

In September 2018, the Supreme Court of India decriminalised homosexuality in the country by reading down Section 377 of the Indian Penal Code. Prior to this judgement, Section 377 has been used as an instrument of harassment and physical abuse against hijras and transgender persons. Following this judgement, in April 2019, Madurai bench of the Madras High Court passed an order stating that marriage solemnised between a man and a transgender woman is valid under the Hindu Marriage Act.²³ In this verdict, the Court also passed a historic order directing the Secretary to Government, Health and Family Welfare Department, Government of Tamil Nadu to pass a Government Order (G.O) prohibiting the non-consensual surgeries on intersex babies.

3. Critiques of the Transgender Persons (Protection of Rights) Act, 2019

The Transgender Persons (Protection of Rights) Act, 2019 has been severely criticised by the transgender community in India for several reasons,²⁴ including no reservation in employment and education for transgender people, mandatory SRS to be identified within the binary genders of male and female, among others.

²⁰ Abraham. R. (2017). All you need to know about the Transgender Persons Bill, 2016. The Hindu. November 30. Retrieved from <https://www.thehindu.com/news/national/all-you-need-to-know-about-the-transgender-persons-bill-2016/article21226710.ece>

²¹ Bhatia, G. (2019). The Rajya Sabha must amend the Transgender Persons Bill. Hindustan Times. January 05. <https://www.hindustantimes.com/analysis/the-rajya-sabha-must-amend-the-transgender-persons-bill/story-WFyPFztPVABpfaOyDYBt5L.html>

²² Ministry of Law and Justice, Government of India. (2019). The Transgender Persons (Protection of Rights) Act, 2019. <http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>

²³ Madras High Court. (2019, April 22). Arunkumar Vs The Inspector General Of Registration & Others. Retrieved from <https://indiankanoon.org/doc/188806075/>

²⁴ Editorial. (2018, December 20). Rights, revised: on the Transgender Persons Bill, 2018. The Hindu. <https://www.thehindu.com/opinion/editorial/rights-revised/article25783926.ece>

According to this Act, any individual who wishes to identify as transgender should first make an application to the district magistrate. The Act then mandates that all transgender persons should undergo screening by a District Screening Committee to be certified as a transgender person. Further, individuals who wish to be identified within the binary genders of male and female are required to go through SRS. Mandating SRS is in serious violation of the NALSA verdict of 2014 which recognised self-identification of one's own gender.²⁵

This Act has also been criticised for prescribing lower punishments for sexual violence against transgender persons compared to cisgender women, essentially discriminating against transgender people.²⁶

The definition of transgender in this Act includes persons with intersex variations posing an enumeration challenge. As discussed in Part 1, not all intersex persons may identify as being transgender. Additionally, the Act does not provide any protection against the violation faced by intersex persons including non-consensual surgical interventions altering the sex characteristics of intersex infants and children.²⁷ Besides, the rape laws in the country do not cover transgender persons who are rape survivors.²⁸ However, a recent Delhi High court verdict ordered the police to accept complaints of sexual harassment from transgender persons.²⁹

The Act has also been criticised for a lack of clarity with respect to the rights of intersex individuals. According to Section 12.3 of the Act, transgender individuals even over eighteen years of age can be separated from their natal family/parents and placed in a rehabilitation centre.

²⁵ Masih, N. (2019). A bill meant to protect India's transgender community instead leaves them angry and aggrieved. The Washington Post. November 30. Retrieved from https://www.washingtonpost.com/world/asia-pacific/a-bill-meant-to-protect-indias-transgender-community-instead-leaves-them-angry-and-aggrieved/2019/11/29/6c2c7b7e-116b-11ea-924c-b34d09bbc948_story.html

²⁶ Ibid.

²⁷ Murphy. (2019). India's transgender rights Bill faces 'unanimous opposition' from trans people. Radio New Zealand. January 07. <https://www.radionz.co.nz/news/world/379624/india-s-transgender-rights-bill-faces-unanimous-opposition-from-trans-people>

²⁸ India Today Web Desk. (2018). Up to Parliament to make rape law gender-neutral, says Supreme Court. India Today. November 12. <https://www.indiatoday.in/india/story/up-to-parliament-to-make-rape-law-gender-neutral-says-supreme-court-1386633-2018-11-12>

²⁹ Times News Network. (2018). Transgenders can file sexual harassment case: Cops to HC. The Times of India. November 28. <https://timesofindia.indiatimes.com/city/delhi/cops-refused-to-file-fir-transgender-girl/articleshow/67278564.cms>

³⁰ This clause takes away the agency of any transgender individual over eighteen to take decisions about their living conditions, a right that is available to cisgender men and women.

Additionally, this Act defines family as only those related by blood or marriage, or adoption made by law.³¹ This goes against the kinship that the transgender community forms outside its family. Many transgender individuals are ostracized by their natal family for their gender identity and expression and even thrown out of homes.³² In these situations, it is these extended kinships and adopted family that offer support to them. This Act is against that form of family and in direct violation of the Hijra family system and the right of transgender people to live with family and partners of their choice.³³

There are no provisions for any reservation for transgender persons in employment or educational institutions in this Act. NALSA verdict of 2014 mandated the inclusion of transgender people with a reservation under OBC (Other Backward Classes) category. However, Grace Banu³⁴ notes that this reservation serves no purpose for transgender people who are also Dalit, another historical marginalised population group in India. Besides, even with other things being equal, usually cisgendered persons are preferred over transgender persons, if they are considered equivalently within the OBC category, thereby making vertical reservation relatively useless even for trans Dalit, adivasi and even OBC people, unlike horizontal reservation which accounts for the intersection of caste and gender, notes Bittu Karthik.³⁵

The transgender community wants horizontal reservation within each class to access better educational and employment opportunities. This is one of the main concerns of the transgender community against the Transgender Act.

³⁰ Section 12.3 of Transgender Persons (Protection of Rights) Act, 2019 states: "Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in rehabilitation centre." See Footnote 22.

³¹ Borpujari, P. (2019). India's Trans Community Faces Continued Discrimination. The Diplomat. January 24. <https://thediplomat.com/2019/01/indias-trans-community-faces-continued-discrimination/>

³² Padhi, M., & Mohanty, P. A. (2019). Securing Transgender Rights through Capability Development. Engage. Economic and Political Weekly. Vol. 54, Issue No. 1, January 05. <https://www.epw.in/engage/article/securing-transgender-rights-education-finance>

³³ Mogli, V. V. (2016). Responses From Trans & Intersex Communities On The Transgender Rights Bill. Feminism in India. August 9. <https://feminisminindia.com/2016/08/09/trans-community-response-transgender-rights-bill-2016/#.V6tIUZN949d>

³⁴ Grace Banu is a dalit and transgender activist and writer. She is the Founder Director of Trans Rights Now Collective.

³⁵ Bittu Karthik is a biologist and a genderqueer transman, from THITS. THITS is an unfunded, unregistered mass organisation of transgender, hijra and intersex activists from across Telangana.

4. Challenges with implementation of the NALSA judgement

The judgement by Supreme Court of India in the National Legal Services Authority (NALSA) Versus Union of India and Others case in 2014 recognised every individual's right to self-identify their gender.³⁶ This verdict acknowledges the fundamental rights of transgender persons including right to life. However, the scope of this verdict does not extend clarity around civil rights such as marriage, divorce or even inheritance from their natal family.

Further, there seems to be no reason why a transgender must be denied of basic human rights which includes Right to life and liberty with dignity, Right to Privacy and freedom of expression, Right to Education and Empowerment, Right against violence, Right against Exploitation and Right against Discrimination. Constitution has fulfilled its duty of providing rights to transgender people. Now it's time for us to recognize this and to extend and interpret the Constitution in such a manner to ensure a dignified life of transgender people. All this can be achieved if the beginning is made with the recognition of TG as third gender. - NALSA Vs. Union of India and Others³⁷

The directives given by this judgement required state governments to ensure the inclusion of transgender people in different spaces. As a first step this meant including transgender as a gender category on different forms and applications, online and offline, for those transgender persons who did not identify within the binary. However, all state governments did not act on these directives. Apart from that, all respondents note that the gender category shown on the different identification documents such as ration card, PAN card, driver's license, bank passbook, Aadhaar, voter ID, among others, are different.

While some identity documents use 'Transgender' to signify anyone who identifies outside the binary genders, other identity documents use 'Other' or 'Third Gender' as categories to denote transgender people. Transgender Welfare Boards have been set up in some states like West Bengal, Tamil Nadu, Kerala, Manipur, among others.

³⁶ Wikipedia contributors. (2019, December 23). National Legal Services Authority v. Union of India. In *Wikipedia, The Free Encyclopedia*. Retrieved from https://en.wikipedia.org/w/index.php?title=National_Legal_Services_Authority_v._Union_of_India&oldid=932081070

³⁷ Supreme Court of India. (2014, April 15). *National Legal Services Authority Versus Union of India and others*. Writ Petition (Civil) No. 400 of 2012 with Writ Petition (Civil) No. 604 of 2013. Indian Kanoon. Retrieved from <https://indiankanoon.org/doc/193543132/>

Participants at the Symposium on Legal Support for Accessing Transgender Rights in 2018 noted that most of these boards are not fully functional. In Odisha, the government had announced loans and schemes for transgender persons, and these were starting to be rolled out in the second quarter of 2018.³⁸

All respondents of this study expressed dissatisfaction with implementation of the directives issued by the Supreme Court. Government officials including district magistrates and gazetted officers, continue to ask transgender individuals for a Sex Reassignment Surgery (SRS) certificate for any identification document to be changed to their preferred name and gender when in fact directive 5 clearly defines any insistence on SRS as immoral and illegal.

The implementation of the NALSA judgement has not been uniform across the country. Even in Tamil Nadu, the first state to establish a Transgender Welfare Board, government initiatives have been in an attempt to gather a vote bank rather than implement the NALSA judgement.

In Tamil Nadu, the social welfare schemes for transgender people have been delivered not to implement NALSA directives but to gather a vote bank for the ruling party by providing homes, loans for self-help groups and job opportunities. - Sankari³⁹

Even with the passing of the NALSA verdict of 2014, there continues to be a lack of awareness about the verdict among the transgender people except in some states like Tamil Nadu. Rural areas often suffer from a lack of information regarding the rights guaranteed by the NALSA judgement and sometimes there's no access to CBOs and similar organisations, notes Amrita Sarkar. Apart from that, NALSA verdict looks at all transgender people as a third gender which can be problematic notes Bittu Karthik. However, many transgender people identify within binary genders of male and female.

Since the verdict allows for self-identification but boxes all transgender people as 'Third Gender', many trans men do not come out as being transgender. This further leads to lack of numbers for trans men due to a no show even for those who want to avail any benefits under the transgender welfare schemes.

Trans men predominantly refuse to disclose their identity of being transgender due to the vulnerability that they face due to their assigned gender at birth. As a combination of

³⁸ Human Rights Law Network. (2018, February 14). Meeting Report on Symposium on Legal Support for Accessing Transgender Rights. Retrieved from <https://hrln.org/wp-content/uploads/2018/05/Transgender-Consultation-Report.pdf>

³⁹ Sankari, along with Siva, co-founded Nirangal. She has over a decade of experience in advocacy and crisis intervention for communities of diverse gender and sexual identities and is well known among the activist groups in Chennai.

self-identification and facing vulnerability, trans men have so far not been forthcoming about getting identification cards as transgender in states other than Kerala. - Selvam

The prerequisites for procuring any identification document in an individual's preferred name and gender changes from place to place and even from person to person depending on the government official in a particular state. There are officers who would approve all applications whereas there are those who have denied applications of applicants (who identify as a woman) with a male sexual organ, observe respondents.

5. Census 2011 and data discrepancies

Given the historic exclusion and continued negligence by the government, the transgender community in India continues to face challenges with respect to accessing public welfare schemes. Respondents note that the national Census data of 2011 misrepresents the transgender community and is nonetheless being used to design development and welfare schemes for the community.

Certainly I know a lot of trans people who were not part of the census. All the trans people I know have not been counted. So there are certainly more people not counted. 4.8 lakh people is a vast underestimation. - Bittu Karthik

Primary Census Abstract data of 2011 identifies a total population of 4,87,803 persons in India who identified their gender as 'Other', that is neither as 'Male' nor as 'Female'.⁴⁰ The Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, clarifies that the 'category of "Other" would not only include transgender but also any person who desired to record sex under the category of "Other" ... [and] that transgenders might have returned [sic] themselves either male or female depending on their choice.'⁴¹

The 2011 census is flawed in many ways. Some trans individuals have their identity as female and others as transgender. I don't know if they were issued based on the NALSA judgement. I got my Voter ID before the NALSA judgement. I am addressed as female in my Voter ID. So I would have entered the census as a woman and not a trans woman. So how then can one expect accurate census data with respect to transgender individuals in the country? - Sankari

⁴⁰ Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India. Primary Census Abstract Data for Others (India & States/UTs). Retrieved from http://censusindia.gov.in/2011census/PCA/PCA_OTH_0000_2011.xlsx

⁴¹ Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India. Brief Introduction to Primary Census Abstract Data for 'Others'. <http://censusindia.gov.in/2011census/PCA/Primary%20Census%20Abstractother.pdf>

The respondents of this study observed serious concerns about the negative impacts of the underestimation of the transgender population in the country by the Census data of 2011. This Census data remains instrumental in informing policy decisions and planning of welfare schemes although the limits to its accuracy have been well documented.

The census data is very small and the government is using this data to design development and welfare schemes for trans people which are very slow and very pathetic. They allot only a minimum amount because the census data is just a fraction, say 5% to 10% of the actual trans population in the country. This happened because the enumerators were not well-trained. Transgender enumerators who understood the pulse of the community and can get into the pockets should have been inducted by the government. But the government did no such thing. Now the trans community is suffering because of this false data. They are not getting benefits assured by the NALSA judgment. - Aparna Banerjee⁴²

In Tamil Nadu, the transgender (woman and third gender) population was included in the Census not through door to door surveys but their count was approximated based on the transgender ID cards issued by the Aravani Welfare Board, notes Jaya.⁴³ Given that the Aravani Welfare Board has never issued a transgender ID card to any trans man, it is safe to say that the census data from Tamil Nadu does not include trans men. Respondents also mentioned that many transgender people identifying within the binary have been recorded in the census as female or male. Some respondents also note that the family of a child may not admit to the real gender of their child to the enumerators in a census or other government enumeration processes.

NALSA says that you need not identify as a third gender even, if you are a trans person. So it will never get recorded in such a situation [like enumeration for Census]. So if I write male, I will be male. I will never be included in the Census. Transgender people who identify within the binary and have identity documents in a binary gender don't get accounted for in the transgender category in the census - Shaman Gupta⁴⁴

Official statistics collection seems to be making transgender individuals further vulnerable by asking them to *come out* to the state in order to access the human rights based welfare services

⁴² Aparna Banerjee, a hijra activist working for the sexual minorities and gender nonconforming people since 2000, remained a member of the State Transgender Development Board and contributed to the state figures and welfare measures and believes in equity rather than equality.

⁴³ Jaya as General Manager of Sahodaran, manages multiple projects across 2 locations in Chennai concerned with HIV prevention among gay, bi men and trans women and also plays a key role in organising city-wide and state-wide LGBT visibility events through the Chennai Rainbow Coalition and the Tamil Nadu Rainbow Coalition (respectively).

⁴⁴ Shaman Gupta is a part of TWEET (Transgender Welfare Equity and Empowerment Trust), a community based organisation working for empowerment and welfare of trans persons. The organisation specifically concentrates on providing psycho-social support and guidance to trans masculine persons across India with respect to healthcare, legal changes, education and employment.

and their citizenship rights, emphasising the latent shift from human rights to data as the basis for welfare decisions. Government asking marginalised groups of people to come out just to avail specific benefits, is not a safe option for a marginalised group like the transgender community. With the passing of the Transgender Persons (Protection of Rights) Act 2019, transgender individuals, who are an already marginalised group of people unlike cisgendered individuals, are now being compelled to reveal their preferred name and gender to government officials and databases for the sake of being represented on official statistics and sectoral databases, and to access their rights.

Appendix: Questions on legal rights and enumeration process

Below is a set of questions that were part of the longer questionnaire that structured the interviews with respondents of this study, and that are relevant for the analysis presented in this part of the report.

- What were the early initiatives to enumerate and/or issue identity documents by the central or the state governments? Were there any initiatives apart from HIV programmes?
 - When did HIV-related intervention begin in India? Do you know if HIV interventions programmes were the first to recognise transgender population in India in terms of national data?
 - How were transgender people defined in the HIV intervention programmes? When was MSM segmented into MSM and transgender people? Does it also include transmen?
- What was the experience and process of participation for transgender persons in such initiatives (prior to Census 2011)? Were these effective initiatives, in the sense of these identity documents being provided to all/most transgender persons, and the transgender persons being effectively use these identity documents to access public and private welfare schemes? Do you know of instances, personal or otherwise, that you might want to share?
- Do you know of individuals who participated openly in the 2011 census? What were their experience of being enumerated in the Census as a transgender individual?
- What does the NALSA judgement say with respect to identity documents and enumeration processes?
 - In the NALSA case and in subsequent relevant cases, what kind of data and statistics have been relevant and effective in demonstrating the difficulties that transgender persons face? What kind of data made an impact on the NALSA and Section 377 verdict?
 - Conversely, have they felt the lack of any specific data sets (either collected by public authorities or organisations fighting for transgender rights) that undermine or become a barrier in making an effective argument in such cases?

- How has inclusion of non-binary or third gender identifying trans and intersex people in national data collection initiatives changed since Census 2011 and the NALSA verdict of 2014?
- How would you say the implementation of NALSA judgement has been in across India with respect to the inclusion of transgender people? What are the barriers and exclusions that still remain?



BIGDATA
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Gendering of Development Data in India: Beyond the Binary #3

Identity Documents and Access to Welfare

June 2020

Author: **Brindaalakshmi.K**

Editor: **Sumandro Chattapadhyay**

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Please read the full report here:

<https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

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1. Introduction

The previous part of this report traced the history of the legal struggles of transgender persons for the recognition of their constitutional rights in India, the legislations that followed, the process of enumerating transgender persons and the challenges with the legislation and the enumeration process. Although the Supreme Court of India recognised their right to self-identify their gender and detailed out nine directives for the inclusion of transgender persons in 2014, the incomplete implementation of the NALSA Vs. Union of India verdict and the under-counting of transgender population by Census 2011, have had serious implications on welfare delivery to transgender persons in India. Understanding the implications of these gaps on welfare delivery, needs a closer look at the enumeration process and the different identity documents used for enumeration. Gendering of development data in India requires a closer look at gender as a data category and how the protocols of its enumeration affects the access to rights of an entire population group - transgender persons - in India.

In this third part of the report, we focus on the recording of (preferred) name and gender on identity documents, the difficulties of changing such recorded data, and implications of the same for transgender persons when accessing welfare services. This part will also look at the implications of the gaps in the implementation of the NALSA verdict of 2014 and the Census 2011 process on the rights of transgender persons in India.

2. Recording gender on identity documents

Although the umbrella term transgender is used to refer to the gender identity of persons who do not identify with the gender of their assigned sex at birth, the transgender community includes several identities including hijra, aravani, thirunangai, thirunambi, trans woman, trans man, kinnar, kothi, jogappas,¹ among others with some traditional identities more visibly present in some Indian states. However, the existing legal framework in India does not allow transgender persons to specifically identify as any gender outside male, female or transgender. With legal recognition of any citizen being guaranteed by specific identity documents - including general purpose and function-specific identity documents - it is necessary for any individual to procure these documents to access welfare programmes.

¹ Gayathri N., & Karthikeyan, P. (2016, March). Inclusion and Exclusion of Third Genders – Social Hindrance in India. *Asian Journal of Research in Social Sciences and Humanities*. Vol. 6, No. 3. Pp. 20-30.

No standard process for recording (including updating) the name and gender on identity documents, however, have been specified by a court verdict or government order. The process to be followed varies across states in India, and varies for identity documents. Changing the details on an identity document to one's preferred name and gender often requires another identity document in preferred name and gender. The legal procedure of filing an affidavit to change one's name and gender requires an identity document in the individual's given name and gender. Since many transgender persons leave their home (of birth) without their identification documents, this process becomes impossible for most.

Some respondents of this study highlighted the need for more than three gender categories, including the choice for individuals to put down their own identity, be it transgender, man, woman, trans man, trans woman, hijra, kothi, kinnar, among others.

Non-binary people don't prefer an identity of a trans man or a trans woman. For instance, there is a category called Kothi. This category signifies an individual who is very feminine but wears shirts, pants or lungies. Kothi is a cultural category that falls in between 'male' and 'trans woman'. Often Kothi-identified individuals, as well as gay and bisexual men get classified as MSM under the government HIV program. If someone asks for an identity that is neither male nor female, neither trans woman nor trans man then what category is left for that person? If I take my own example, my gender identity is gender fluid but I am a male on all my identity cards. I have an issue with my gender fluid identity not featuring on any official document. If I insist on mentioning that I'm gender fluid, they ask me, "What is this now?". The unspoken feeling underlying this question is "Already there are so many categories and you have come up with one more". They are stating their practical issues with documentation. - Sivakumar²

Some have also observed views contrary to the above. One respondent suggested that giving room for multiple identities might make the process of identification complicated and counterproductive for people identifying beyond the dominant gender binary of male and female.

I don't think gender and sex should be on any identification document at all, in the same way caste should not be a compulsory part of an ID. ID (any identification document) should have somebody's name and face. That's enough. I think the simplest decision is to have no gender on any ID document. Caste certificates to access certain services or benefits verify your caste, similarly you could have a gender certificate or gender specific ID to identify your gender if you

² Sivakumar, along with Sankari, co-founded Nirangal. He has over a decade of experience in advocacy and crisis intervention for communities of diverse gender and sexual identities and is well known among the activist groups in Chennai.

want to access gender specific services or benefits. That is the simplest solution and also the solution that breaks the idea of gender determinism. Once the transgender movement breaks mainstream notions of gender, gendered labour and associated things, I don't think we should be pushing to make gender relevant when it's not relevant. - Bittu Karthik³

A respondent reminded that, when accessing welfare services or interacting with public or private agencies, gender as a category of information may be collected and used only when absolutely necessary for the matter concerned.

Gender data itself has to be seen in the context of what we are looking at. What is the data that we are collecting and how we are using it? For some other things, gender may not be significant at all. For example, if we are collecting some gender data in relation to say a campaign for SRHR then we could collect the data based on what it specifically deals with. There, we will also have to recognise that there may be trans men who have removed their uteruses. There could be people who identify as trans women and might have fathered children. Setting the context becomes useful then. - Delfina⁴

As mentioned above, there is a need to self-identify one's transgender identity while accessing specific health services like sexual and reproductive health services that require the assigned sex to access the right services. However, self-disclosure of this information to doctors and other health professionals has often resulted in harassment for transgender persons.⁵ Insensitivity of medical professionals leads to non-disclosure of vital details leading to complications in the physical and mental health of transgender persons.

3. Changing gender on identity documents

The processes followed by transgender persons to change their name and gender in identity documents vary from state to state, and even different towns and cities, due to different processes

³ Bittu Karthik is a biologist and a genderqueer transman, from THITs. THITs is an unfunded, unregistered mass organisation of transgender, hijra and intersex activists from across Telangana.

⁴ Delfina is an activist, playback theater artist, and social worker. They are associated with Nirangal, an organization based in Chennai, Tamil Nadu, India, which works for the rights and welfare of those with alternate gender and sexual identities.

⁵ Salian, P. (2018, August 12). 'How can you be raped?' Doctor's words to transgender in India an example of the 'transphobia' that stops many getting health care. South China Morning Post. Retrieved from <https://www.scmp.com/lifestyle/health-wellness/article/2159156/how-can-you-be-raped-doctors-words-transgender-india>

in each state, notes Shaman Gupta.⁶ They often have documents both in their preferred name and gender and in their assigned name and gender for various reasons including losing their eligibility for insurance claims procured in their assigned gender, property rights which may be lost with changing gender, among others. Respondents note that transgender persons may have their identity documents:

- In their given name and assigned gender,
- In their preferred name and gender within the binary genders of male and female,
- In their preferred name and gender identifier as transgender, and
- One set in their given name and assigned gender and another set of documents in their preferred name and gender. This may be male, female, or transgender.

These aspects with respect to transgender individuals, however, have not been covered by any legislation or verdict so far. Among some of the more traditional identities, transgender individuals live with their adopted family from within the transgender community. As noted by respondents, this adopted family works as their support system and network and aids them in procuring their identification documents, note respondents. Transgender persons, outside of the jamaad⁷ system or not associated with any CBO, may find it difficult to change their documents to their preferred name and gender, As noted by respondents, this is especially true for people with no identification documents because they have run away from home without any ID document in their given name and gender. It is also easier to get an identification document within the binary genders if the person passes as a person of the mentioned gender.

It is easier to change your gender within the binary if you pass as a person from your preferred gender. - Shaman Gupta

Changing the document also depends on the need to face officials who may not be well-informed about NALSA or the paperwork for name and gender change. Online processes may be preferred in such instances, note respondents. Apart from the need for existing identification documents in their given name and assigned gender, transgender persons also face several other challenges with respect to procuring identification documents and entering different data sets to access welfare schemes. In the state of Bihar, government documents do not still include a third gender category because this inclusion would cost the government an additional Rs. 70 crores, noted

⁶ Shaman Gupta is a part of TWEET (Transgender Welfare Equity and Empowerment Trust), a community based organisation working for empowerment and welfare of trans persons. The organisation specifically concentrates on providing psychosocial support and guidance to trans masculine persons across India with respect to healthcare, legal changes, education and employment.

⁷ Jamaad is the adopted family system followed by many traditional transgender identities/groups in India.

Reshma Prasad, research scholar and member of the Bihar Transgender Welfare Board during the Symposium on Legal Support For Accessing Transgender Rights.⁸ There continues to be a lack of understanding about the distinction between sex and gender uniformly across all identification documents.

It's a deep rooted conception of gender and failure to distinguish between sex and gender. In most Indian languages, they are no separate words for sex and gender. It's usually one word. - Dr. L.Ramakrishnan⁹

Similarly, respondents note that several government agencies arbitrarily demand a medical certificate for Sex Reassignment Surgery (SRS) before issuing or updating identity documents, although the NALSA verdict of 2014 calls it illegal to do so. Officials insist on the medical certificate more with transgender individuals who identify within the binary genders of male and female. A certificate from a psychiatrist is insufficient, notes Dr. L.Ramakrishnan. Although the NALSA verdict had recommended that the government provide free SRS services in public hospitals, this is not the case in most states. Sometimes, doctors even fear issuing SRS certificates to their patients.¹⁰ Considering that the cost of SRS is quite high, not all transgender individuals can afford it. This jeopardises their ability to procure identification documents in their preferred name and gender, note several respondents. Often, transgender individuals are expected to go through a screening committee to get their transgender status approved. This committee often uses inappropriate methods like touching the genitals of a trans woman who has not undergone SRS, among others.

The screening committee used utterly inappropriate methods to make their decisions: such as touching the genitals of a trans woman to check if their male organ becomes excited. If it did, the committee did not accept the individual as a transgender. The method used for screening amounts to harassment and has no place in determining the gender identity of individuals.¹¹

It is worth noting that although transgender people in the country were officially enumerated for the first time in 2011, their gender identity and right to self-identify was recognised only in 2014. However, respondents have noted that several transgender people had procured different

⁸ Human Rights Law Network & Solidarity and Action against the HIV Infection in India. (2018, February 14). *Meeting Report from Symposium on Legal Support for Accessing Transgender Rights*. Retrieved from <https://2019.hrln.org/wp-content/uploads/2018/05/Transgender-Consultation-Report.pdf>

⁹ Dr. L. Ramakrishnan is a public-health professional working with the NGO SAATHII. His areas of focus are advocacy and capacity-building towards strengthening access to healthcare and legal services for LGBTI+ and populations affected by HIV/AIDS.

¹⁰ See Footnote 8. Page 8.

¹¹ See Footnote 8. Page 23.

identification documents even prior to the NALSA verdict of 2014 in a binary gender. Given that different identification documents are required to access different welfare schemes and public services, it would be pertinent to understand the different documents, the process involved in procuring them and the challenges faced by the transgender community in procuring them.

4. Transgender Identity Cards

Transgender Identity Cards (TIC) are significant, in states that issue them, for individuals to procure other identification documents in their preferred name and gender. These Cards are issued by the Transgender Welfare Board of the state concerned but neither all states have established a Board, nor all established Boards have begun to issue such Cards.¹²

Tamil Nadu was the first state to set up a Welfare Board called the Aravani Welfare Board in 2008. This Board was the first to issue TIC to transfeminine women. The enumeration of transgender population in Tamil Nadu for the Census of 2011 was not done through door to door survey. Instead, their count was approximated based on the number of TIC issued by the Aravani Welfare Board, notes Jaya.¹³ Respondents note that in states like Tamil Nadu, the Board does not include any transgender man, and TIC have never been issued to transgender men. An application for the inclusion of trans men in the Transgender Welfare Board (Tamil Nadu), was submitted to the Principal Secretary of the Department of Social Welfare, only in December 2019. Therefore, transgender men of Tamil Nadu as well as transgender women who identify within the binary are unlikely to be included in the Census of 2011. However, this flawed census data is now being used to allocate funds for welfare programmes.

A common problem with the TIC issued in Tamil Nadu is that it identifies the gender of all individuals as 'Transgender,' giving no option for those identifying within the binary genders of 'Female' and 'Male'. This format does not allow for self-identification of one's gender as prescribed by the NALSA Verdict of 2014. Respondents note, prior to the passing of the Transgender Act 2019, that the availability of TIC made it easier to change the details on different identity documents. They also note that TIC is usually issued by the Transgender Welfare Board in

¹² Information available in the internet suggest that the following states have already established a Transgender Welfare Board: Andhra Pradesh, Bihar, Chandigarh, Gujarat, Kerala, Manipur, Rajasthan, Tamil Nadu, and West Bengal.

¹³ Jaya as General Manager of Sahodaran, manages multiple projects across 2 locations in Chennai concerned with HIV prevention among gay, bi men and trans women and also plays a key role in organising city-wide and state-wide LGBT visibility events through the Chennai Rainbow Coalition and the Tamil Nadu Rainbow Coalition (respectively).

each state. However, the existence of a Transgender Welfare Board neither guarantees that it is functional nor that it issues TIC, according to the respondents.¹⁴

In terms of a uniform identity document format that will account for transgender persons and also keep their identity safe, several respondents have vouched for the format of the TIC issued in Kerala.¹⁵ The cardholder has the option of choosing 'Female', 'Male', and 'Transgender' as their gender identity when identifying as a transgender person. This chosen gender identity is mentioned on the Card. Presently, the Card issued by states like Tamil Nadu only mention transgender on the identity card with no provision for individuals to identify within the binary genders, even if they don't identify with the gender of their assigned(-at-birth) sex. The format of the TIC document issued in Kerala, however, allows self-identification including as the binary genders of female and male, and also accounts for all transgender persons irrespective of their self-identified gender. This format gives individuals the choice of self-identification without misrepresentation in the data, notes Vihaan Peethambar.¹⁶

Here you have the option to put female, male or transgender. So you can identify within the umbrella category of transgender, and yet specify a subcategory of male, female or third gender. The advantage of this is that if an individual wants to access government schemes, they can use the [TIC] as proof that they are part of transgender community, but if they don't want to access schemes and only want to identify as binary on all legal documents, they can use the [TIC] to change their Aadhaar and PAN other documents as female or male. Apart from the use for change of other official documents, they don't have to use this transgender identity card at all. To me, this is the best system. - Dr. L.Ramakrishnan

"I think the next step would be to add more options such as gender fluid, bigender etc. for people who fall under the transgender spectrum but do not identify within the binary of male/female or transgender", says Vihaan Peethambar explaining that others as a category includes transgenders persons while transgender as a category does not have room for people who identify as gender non-conforming or intersex, among others.

Having a TIC in one's preferred name and gender, however, does not necessarily allow a transgender person to update their recorded name and gender in other vital identity documents, or necessarily offer access to services according to their preferred gender. Here are a few examples

¹⁴ See Footnote 8. Page 11.

¹⁵ Social Justice Department, Government of Kerala. Identity Card for Transgender Persons. Retrieved from http://swd.kerala.gov.in/scheme-info.php?scheme_id=IDF1Mw==

¹⁶ Vihaan Peethambar is a Board Member of Queerala, an LGBTIQA+ Organization (Kerala). Queerala is a Community Based Organization for Malayali LGBT+ people, focused on advocacy of Sexual Orientations and Gender Identities to create and advance safe spaces for LGBT+ people in Kerala. We aim for a society free of discrimination against queer people by creating awareness about LGBT+ lives engaging with the government, media and other institutions.

of socio-bureaucratic discriminations that transgender persons face when procuring necessary documents, the absence of which further reinforces their marginalisation.

- Presently, there is no option of changing name and gender on an individual's birth certificate to their preferred name and gender. Therefore, using their birth certificate as proof of identification anywhere would reveal their transgender identity.
- As Class X and XII certificates are issued on the basis of the birth certificate (as a proof of identity and name), they state the given (at birth) name of a transgender person even if the person has all other documents in their preferred name and gender.
- The inability to change their name and gender on their birth certificates and school certificates has forced many to take up jobs at a much lower salary than market rate in order to keep their identity safe.
- Due to the stigma of being transgender, transgender persons are forced to shift houses frequently and are charged much higher rents. Hence, a valid address proof becomes a serious challenge to open bank accounts.
- Beyond treatment for HIV patients, the healthcare needs of the transgender community is not properly addressed by the public healthcare system. Hospitals do not have transgender wards to address the health needs of the transgender community.
- There continues to be insistence on SRS certificate from the surgeon who performed the surgery for the gender/sex change one's name and gender on the passport. In November 2019, Sivakumar, a respondent in this study, quoting the NALSA judgement of 2014, moved the High Court of Madras to declare passport rules that insist on surgery to be unconstitutional.¹⁷

5. Identity documents, data, and access to welfare

Each identity document system refers to a database system as well. Access to welfare programmes offered by government agencies is possible only if an individual can prove that they are eligible for the same using official identity documents, and by being counted across key public databases that determine their eligibility for inclusion in the welfare programmes concerned.

¹⁷ The Hindu Editorial. (2019). *HC issues notice to Centre on PIL over passport rules on sex reassignment surgery*. The Hindu. November 13.
<https://www.thehindu.com/news/cities/chennai/hc-issues-notice-to-centre-on-pil-over-passport-rules-on-sex-reassignment-surgery/article29962712.ece>

There are two broad approaches to government welfare services and payments: inclusive and exclusive approaches. Dr. L. Ramakrishnan notes that the inclusive approach, wherein existing schemes are extended to include transgender persons, is easier to advocate for. An inclusive approach would make all existing government programmes and schemes inclusive of all, including transgender persons, while the exclusive approach would look to introduce exclusive programmes for the transgender community.

The ideal situation should be that all the schemes are made inclusive... [I]f it's a scheme for women, it should be inclusive of trans women [also]. If we are talking about the Domestic Violence Act, it should be inclusive of trans women - that is one approach. But if you want exclusive schemes then there may be an issue. If someone has a gender identity of male or female (on their identification documents) and they want access to a transgender specific scheme, how can they prove that they are not a cis woman or a cis man, (unless they have a [TIC] like the one from Kerala)? - Dr. L. Ramakrishnan

NALSA verdict of 2014 directed that the Government of India to provide reservations for transgender people under Other Backward Classes (OBC) category. Respondents note that this treatment of transgender persons can be problematic. The intersectional problem here is the question of how transgender is seen as a population category by the state. If the Government views any individual as part of the OBC category, then any intersectionality with marginalisation around caste becomes invisible. Transgender community having an unspecified fraction of the reservation within OBCs is relatively useless for transgender Dalit people, Adivasi and even OBC (Other Backward Class) people, unlike horizontal reservation that provides for intersecting categories of caste and gender, notes Bittu Karthik.

Further, changing an individual's name and gender on a caste certificate also poses various challenges. With dependency on other identity documents, procuring a caste certificate in one's preferred name and gender becomes a challenge for transgender persons, further marginalising them. Irrespective of the gender, obtaining a caste certificate is quite challenging, according to Sivakumar. Vyjayanti Vasanta Mogli also notes that the caste of an individual can be derived based on the locality where a person lives in a village and their surname.¹⁸ This leads to further discrimination by government officials against transgender individuals who are also Dalit.

Individuals from the Dalit community or other scheduled caste communities are subjected to indirect discrimination. Mostly community certificates will be in the applicant's assigned name. When we go to get it changed, we are asked a thousand questions regarding who we are and

¹⁸ Vyjayanti Vasanta Mogli is a transgender RTI Activist & Co-founder, Queer Swabhimana Yatra (QSY) & Telangana Hijra Intersex Transgender Samiti (THITS).

who gave us this name and why, so on and so forth. They ask for documents that validate the change in name. There will be a delay in attending to our requests compared to others. - Grace Banu¹⁹

The present reservation system follows a vertical reservation with respect to transgender persons instead of a horizontal reservation within their specific caste categories.

We are following the vertical reservation for 'male' and 'female', and the horizontal reservation for SC, ST and OBC. Only when transgender persons get both these reservations, equity can be established. A Hindu transgender person, a Dalit transgender person and a Muslim transgender person cannot be uniformly given an OBC reservation. We will definitely not accept that. Moreover, since transgender people don't have reservations, their development gets stalled at various levels despite them being well-educated, skilled and talented.” - Grace Banu

Due to the challenges with respect to procuring identity documents in their preferred names and their self-determined gender identity, transgender persons do not get accounted comprehensively in official statistics. The misrepresentation and under-representation of transgender persons in national scale enumeration drives like Census 2011 undermine their inclusion in development programmes and translates into under-allocation of funds for welfare services and schemes being accessed by transgender persons.

The 2014 verdict on the NALSA Vs. Union of India and Others case recognised self-identification as either male, female, or transgender. However, due to unclear policy framework for transitioning with existing benefits like insurance, property, bank accounts etc, many transgender persons continue to exist in their (birth-)assigned gender and name. This further causes misrepresentation in the total number of transgender persons in the country. Therefore, targeting of development programmes and thus fund allocation for the same based on official statistics poses a number of challenges for the transgender community.

In general, I feel like the solution is partially to allocate funds for minority communities who have been historically marginalised. But in addition one wants the system to be a robust public goods distribution system and to make that system functional for most people, for all public goods like the educational or the health system. - Bittu Karthik

Many transgender persons also insist on self-identifying as transgender for the sake of showing numbers in order to claim welfare benefits promised by the state. They are also often critical of those who identify within the binary.

¹⁹ Grace Banu is a dalit and transgender activist and writer. She is the Founder Director of Trans Rights Now Collective.

There is some level of pressure from the leadership of the transgender subculture, within the jamaad, asking them to identify everywhere only as third gender/transgender. This is done with the reasoning - only then can we get these numbers and only then can they advocate for schemes. - Delfina

Coming out as transgender on official documents aids the numbers impacting fund allocation. However, stigma around disclosing transgender identity is often seen as a reason for people's non-disclosure of their transgender status. Accessing transgender specific welfare benefits means facing high level of social and bureaucratic harassment. Disclosure of a person's transgender status depends on their needs, notes Shaman Gupta, and adds that an individual needs to choose between harassment and welfare benefits. This is likely to change once the stigma comes down.

Right now, people don't care about not being included in the government system. Right now, people care about stigma. To survive, whether I've to choose M, F or T, I'll go that way. Once the stigma in being identified as a transgender person gets slightly removed, then people will think, okay, probably I should identify as a transgender person because there will be more schemes for other persons who need it. Probably I don't need it, somebody else needs it. At least the government will have the data about the number of people that are there. - Shaman Gupta

Prioritising the need for data about the socio-economic status of transgender persons' lives, for planning and delivery of welfare programmes aimed at improving their well-being, however, creates an avoidable barrier for existence of such development programmes. In the absence of such welfare programmes, transgender persons are disincentivized from ensuring that they are comprehensively represented in their self-determined gender identity in state databases relevant for development planning.

Transgender persons don't want to assert their rights for reservations or employment or fight for their rights as transgender people in the state of Meghalaya because making [identity documents] as transgender was easy but they wonder in fear whether their state will really give them the benefit of being a transgender person. So there are no policies or programs or any legal protection schemes or reservation for them in educational institutions or employment. So they wonder what the point is in procuring [identity documents] with a transgender identity. It is upon the state to formulate a policy irrespective of the number so that people can come out once they know that the government is working towards their welfare. This will definitely encourage them to come out. - Rebina Subba²⁰

²⁰ Rebina Subba is a social justice lawyer working with marginalized communities since 2008. She is the founder of 'Shamakami – One Who Desires One's Equal,' the only registered organization working on LGBTQI issues in Shillong. She has been working to make people aware of sexuality and gender issues.

The significant under-representation of transgender persons in official statistics and management information systems of welfare programmes, in turn, undermines the 'data-driven approach' to effectively provide welfare services to transgender persons, who constitute one of the most marginalised population groups in the Indian society, and more so when considered in intersection with their other social identities. Further, the lack of consideration for the different intersections of an individual's identity only creates blind spots in official statistics about the existence of population groups of such intersectional identities and specific combination of challenges they face when accessing welfare. This makes it more difficult for an already marginalised group of individuals, like transgender persons, to make themselves counted on data sets used for development planning, which weakens the potential effectiveness of a 'data-driven approach' to target and deliver welfare services.

Appendix: Questions on identity documents and access to welfare

Here is a set of questions that were part of the longer questionnaire that structured the interviews with respondents of this study, and that are relevant for the analysis presented in this part of the report.

- How many government-issued IDs do most non-binary or third gender identifying trans and intersex individuals usually have? (Do all these IDs contain or show the same information?)
- Are some ID proofs easier to obtain than others? For instance: Aadhaar is supposed to be easier to obtain compared to others.
- How do intersectional identities of individuals (vis-a-vis caste, disability, educational qualification, etc.) pose challenges with respect to procuring a valid identity document?
- What is the process of getting an ID document in your preferred name and gender?
- What are the prerequisites to get an identification document in preferred name and gender example: medical transitioning, surgery etc?
- What are the challenges in getting an ID document in your preferred name and gender?
- What are the challenges that individuals face with respect to accessing healthcare services after procuring a valid ID document?
- What are the challenges that individuals face with respect to accessing government/private banking services? How important is having a bank account for being included and receiving public welfare payments for trans/intersex people? Can trans/intersex people access public welfare payments without having a bank account?
- What are the challenges that individuals face with respect to accessing housing, including rental housing from private individuals, and government allocated housing?



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Gendering of Development Data in India: Beyond the Binary #4

Digital Services and Data Challenges

June 2020

Author: **Brindaalakshmi.K**

Editor: **Sumandro Chattapadhyay**

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Please read the full report here:

<https://cis-india.org/raw/brindaalakshmi-k-gendering-development-data-india>

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1. Introduction

Professor Philip Alston, UN Special Rapporteur on extreme poverty and human rights, writes in his October 2019 report to the UN General Assembly:

[T]he digital welfare state is either already a reality or is emerging in many countries across the globe. In these states, systems of social protection and assistance are increasingly driven by digital data and technologies that are used to automate, predict, identify, surveil, detect, target and punish... [A]s humankind moves, perhaps inexorably, towards the digital welfare future it needs to alter course significantly and rapidly to avoid stumbling zombie-like into a digital welfare dystopia.¹

Due to the digital welfare state's heavy reliance on data, there is an even heightened need to prove one's identity against datasets. This moves into the ambit of 'identify, surveil, detect, target and punish'. The punishment for one's inability to prove one's identity is the denial of access to their guaranteed rights by the state. India is no different. Such a digital welfare state, one that is automated and data-driven, is emerging in India and various components of it are in different states of implementation and functioning. The effects of this *digital welfare dystopia* are already felt in the country, especially by already marginalised populations who face extreme poverty and hence are deeply dependent on effective functioning of welfare services. For example, according to the Right to Food campaign, 56 starvation deaths in India happened between 2015-2018.² 25 deaths in three years were on account of Aadhaar failure.³ Majority of these deaths were among individuals from marginalised castes and tribes, who were eligible for social security schemes but did not receive them from the state, due to cancelled ration cards for failing to link with Aadhaar.

We have already discussed in parts 2 and 3 of this report how the existing official statistics, that is Census 2011 data, under-represents transgender population of India, which leads to under-allocation of funds for much needed welfare programmes directed towards transgender persons. Coupled with this, there have also been emerging possibilities of big data collection by public and private entities, which neither comprehensively counts nor represents the transgender population in India. Usage of this big data to deliver welfare will yet again marginalise the already

¹ Office of the High Commissioner, Human Rights, United Nations. (2019, October 17). World stumbling zombie-like into a digital welfare dystopia, warns UN human rights expert. Retrieved from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25156>

² Anwar, T. (2019, May 28). Jharkhand: People Continue to Die of Hunger, Officials in Denial Mode. Newsclick. Retrieved from <https://www.newsclick.in/jharkhand-people-continue-die-hunger-officials-denial-mode-0>

³ Newsclick Report. (2019, February 18). 42 Starvation Deaths in 2 Years, Campaign Demands Food for Everyone. Newsclick. Retrieved from <https://www.newsclick.in/42-starvation-deaths-2-years-campaign-demands-food-everyone>

marginalised. This ‘irresistible attraction for governments to move in this direction’ of a digital welfare state, without assessing the risks, calls for an immediate review of the impact of digital welfare services being currently implemented, especially on various marginalised population groups, before moving any further in that direction. Please note that such an investigation is, however, beyond the scope of this report.

In this fourth and final part of the report we discuss how the respondents of this study assess the opportunities offered by digital and data technologies for transgender persons to access public and private services more effectively, and in turn to produce more representative data about their welfare needs and priorities. The next section of this document discusses the factors that shape the effectiveness of digital services, to access welfare services and procure identity documents, for transgender persons in India; and the final section explores whether private big data (collected by social media companies, e-commerce companies, telephone and internet service providers, and such) may augment existing official statistics on transgender persons to afford more effective planning and delivery of welfare and commercial services to them.

2. Digital services and challenges of access

Digitisation of identity documents and underlying systems has offered its own set of benefits and challenges to the transgender community. Transphobia and a lack of awareness is commonly observed among government officials issuing the different identity documents. In these circumstances, web-based methods to apply for and obtain identity documents have the potential to significantly help transgender people to avoid social harassment commonly faced when interacting with public officials involved in issuing such documents and enumerating them as beneficiaries. However, not all identity documents may be obtained only through a web-based process. For example, one may apply for Passport through the website concerned yet applicants are still expected to visit the Passport Seva Kendra (the office for passport services) for verification of their identity and other official documents.

Not all key governance systems have been digitised across all states in India. Some government departments in certain states continue to have no proper online presence or lack the correct information with respect to changing an individual’s name and gender in any document. Also, documents required for changing one’s name and gender change may vary in each state and even across different government agencies in a state.

Officially your name and gender change should be accepted everywhere if published in the gazette. But again, the situation is different in different states for the gazette publication. Say, for

Uttarakhand, I went through many websites. I couldn't even find the gazette office's address. So there's no online presence of that gazette to be able to publish [the name change]. I had to actually find that place somewhere in Roorkee. It's a small government office inside a government printing press. You'll go there and then the officer sitting there will tell you [that] they require documents in your assigned name and gender. - Shaman Gupta⁴

Being on the wrong side of the digital divide, shaped by centuries of discrimination and marginalisation, is a harsh reality for the majority of transgender population in India. Along with uneven implementation of digitisation of welfare services and processes of issuing identity documents, access to internet and digital devices is also very uneven among the transgender community. Not more than 10-15% of the transgender population in India effectively uses any digital devices at all, estimates Aparna Banerjee.⁵

First of all, the affordability of that particular technology is a barrier. Secondly, even if you can afford it, not knowing how to use it or being uncomfortable using it is another barrier. These barriers would be applicable also to the larger population but very specifically to transgender individuals. In terms of education, it all depends on the design of that site and/or that app. If it is designed with simplicity and minimum literacy in mind then it will work. - Pawan Dhall⁶

Access to mobile phones is assumed to bridge this access gap to online systems and services. However, observations from different respondents suggest otherwise.

A lot of transgender people do not have smartphones. The small section that does own smartphones uses mostly WhatsApp as they can send voice messages and not have to text to communicate - Vyjayanti Vasanta Mogli⁷

Level of literacy as well as digital literacy are dismal among transgender persons in India. A 2017 study supported by the National Human Rights Commission of India observed that 29% of the transgender respondents from a Tier-1 city and 33% among those from non-Tier-1 locations have

⁴ Shaman Gupta is a part of TWEET (Transgender Welfare Equity and Empowerment Trust), a community based organisation working for empowerment and welfare of trans persons. The organisation specifically concentrates on providing psychosocial support and guidance to trans masculine persons across India with respect to healthcare, legal changes, education and employment.

⁵ Aparna Banerjee, a hijra activist working for the sexual minorities and gender nonconforming people since 2000, remained a member of the State Transgender Development Board and contributed to the state figures and welfare measures and believes in equity rather than equality.

⁶ Pawan Dhall has been engaged with gay, lesbian, bisexual, transgender and other queer community mobilization in eastern and other parts of India since the early 1990s. He now leads Varta Trust, a Kolkata-based gender and sexuality publishing, research, advocacy and training non-profit agency (www.vartagensex.org).

⁷ Vyjayanti Vasanta Mogli Is a Transgender RTI Activist & Co-founder, Queer Swabhimana Yatra (QSY) & Telangana Hijra Intersex Transgender Samiti (THITS).

not attended school.⁸ Further, 45% respondents from a Tier-1 city and 48% among those from non-Tier-1 locations have attended school but have failed to complete Class X. The authors of the study note that '[i]t is a matter of serious concern that transgender persons are denied of right to education even after the enactment of Right to Education Act 2009.'⁹

The low digital literacy significantly hinders the transgender population in India from accessing web-based government and commercial services, note several respondents. With respect to transgender persons who are applying for changing gender identity in order to access welfare schemes, many are still dependent on a representative of a NGO, CBO, or a handful of community members with digital literacy, to fill out their application on online interfaces, notes Pawan Dhall.

3. Private big data and challenges of being counted

Globally, possibilities of using big data generated and owned by private companies for augmenting official statistics and other datasets collected by governments are being explored. UN Global Pulse has been working with private sector companies since 2011 to engage them in 'data philanthropy' - the act of making private big data owned by such companies available to development practitioners and researchers for analysis and predictive modelling.¹⁰ The GovLab at the NYU Tandon School of Engineering has introduced the concept of 'data collaboratives' as an approach towards building partnerships among public and private sectors to 'leverage private data for public good' in a responsible manner.¹¹ A recent report by Data2X notes that '[b]ig data generated from cell phones, laptops, remote sensors, and more can add nuance to our understanding of women's and girls' lives.'¹² However, the effectiveness of such methods of generating *alternative data* about sectoral and general indicators of well-being for transgender persons in India remain questionable.

⁸ Kerala Development Society. (2017, February). *Study on Human Rights of Transgender as a Third Gender*. Retrieved from https://nhrc.nic.in/sites/default/files/Study_HR_transgender_03082018.pdf

⁹ Ibid. P. 23.

¹⁰ Kirkpatrick, R., & Vacarelu, F. (2018, December). *A Decade of Leveraging Big Data for Sustainable Development*. UN Chronicle, Vol. LV, Nos. 3 & 4. Retrieved from <https://unchronicle.un.org/article/decade-leveraging-big-data-sustainable-development>

¹¹ Verhulst, S. G., Young, A., Winowatan, M., & Zahuranec, A. J. (2019, October). *Leveraging Private Data for Public Good: A Descriptive Analysis and Typology of Existing Practices*. GovLab, Tandon School of Engineering, New York University. Retrieved from <https://datacollaboratives.org/static/files/existing-practices-report.pdf>

¹² Grantham, K. (2020, March). *Mapping Gender Data Gaps: An SDG Era Update - Executive Summary*. Data2X. Retrieved from https://data2x.org/wp-content/uploads/2020/03/MappingGenderDataGaps_ExecSummary.pdf

Only a minority of transgender people in India are part of the digital media and economy spheres, and thus big data generated by private companies has a very limited potential to reveal patterns about the transgender community. Many key sectors of economy, say healthcare, serve transgender consumers poorly and often do not offer them need-specific services. A 2014 report by an Expert Committee on the Issues relating to Transgender Persons established by the Ministry of Social Justice and Empowerment notes,

*Transgender people in India face a variety of issues. So far, these communities perceive that they have been excluded from effectively participating in social and cultural life; economy; and politics and decision-making processes... So far, there is no single comprehensive source on the basis of which an evidence-based advocacy action plan can be prepared.. Reports of harassment, violence, denial of services, and unfair treatment against transgender persons in the areas of employment, housing and public accommodation have been discussed in local media, from time to time.*¹³

This makes it unlikely that such private sector actors will be able to generate data about their transgender consumers that reveal patterns of needs and priorities. In the insurance sector, for example, leading private and public companies such as Aditya Birla Health Insurance and SBI General Insurance, respectively, do not cover procedures for Sex Reassignment Surgery (SRS) in their medical insurance products,¹⁴ while Life Insurance Corporation of India, the largest insurance provider in India, consider SRS a cosmetic surgery.¹⁵ Further, not all online service providers offer categories beyond the binary ('Female' and 'Male') for its users to self-identify their gender as when availing the services offered. This implies that such service providers, even when generating big data and making it available to enable monitoring of well-being of its customers by development agencies, are not generating data where transgender persons can be identified and their well-being can be monitored. In the travel industry, the IRCTC website, used for booking Indian Railways tickets, has an option for passengers to self-identify their gender as 'Transgender' while booking a train ticket. However, airline companies and online booking services for the same do not offer this option to passengers while booking a flight ticket, notes

¹³ Ministry of Social Justice and Empowerment, Government of India. (2014). Introduction: Transgender people and their problems. In *Report of the Expert Committee on the Issues relating to Transgender Persons*. P. 2. Retrieved from <http://www.socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>

¹⁴ Venugopalan, A. (2019, March 14). India Inc offers medical cover to LGBTQ partners. The Economic Times. Retrieved from <https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-offers-medical-cover-to-lgbtq-partners/articleshow/68365215.cms>

¹⁵ Arora, P. (2018, November 23). Does Insurance in India Cover Gender Reassignment Surgery?. Vice. Retrieved from https://www.vice.com/en_in/article/a3m3b4/does-insurance-in-india-cover-gender-reassignment-surgery

Aparna Banerjee. All major bus operators also do not offer the gender option of transgender for purchasing tickets online although gender is a mandatory field to book a bus ticket, notes Delfina.

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Access to any private service system like banking, healthcare, housing, or education by any individual requires verification using some proof of identity. The discrimination and challenges in procuring government issued identification documents impacts the ability of transgender persons to access private sector services and to be counted by private data systems. Even with the required identity documents, transgender persons continue to face challenges when accessing essential commercial services.

Recently I went to [a bank] to open an account. Usually, you will have to contact [the bank] and an agent comes home to get the paperwork completed. Even after getting an Aadhaar card, my bank account could not be opened as the data was not matching within their system because 'Transgender' option was difficult for them to sync with. - Aparna Banerjee

This experience of the respondent shows the dependency of private services on government issued documents, and the difficulties transgender persons face even when they have the needed documents only because of gender categories written into information management systems of private companies. Additionally, transgender persons may in fact select a gender option within the binary of 'Female' and 'Male' while accessing any private service and this will not allow the service provider to identify the customer concerned as being transgender. Due to such reasons, there continues to be pervasive misrepresentation and under-counting of transgender people in big data generated by private service providers.

Private companies that offer online services such as e-commerce and travel booking have provisions for using different social media accounts to access such services. Respondents note that transgender individuals are apprehensive about using their social media accounts for accessing any particular service or benefit due to concerns of information privacy and security. Most of them also expressed concerns with the digital footprint of people being used, along with official statistics, to monitor welfare needs of people and to deliver development services accordingly. Most are wary of using their digital footprint or identities especially since transgender people are already a marginalised group.

Along with the worry of general surveillance by the state, there is also a fundamental concern with security of information shared with private services providers, and the threat of such information being disclosed to people known to the transgender person concerned and that

¹⁶ Delfina is an activist, playback theater artist, and social worker. They are associated with Nirangal, an organization based in Chennai, Tamil Nadu, India, which works for the rights and welfare of those with alternate gender and sexual identities.

causing physical and psychological insecurity. Menaka Rao has written about the condition created by making identification of patients using their Aadhaar ID mandatory for accessing life-saving medicines like Antiretroviral Therapy (ART) where a HIV positive patient decided to stop taking medicines when the medical service provider asked for Aadhaar ID due to fear of such personal information being leaked to the person's family members. Rao writes:

Over the past year, Geeta Moorthy, an outreach worker who helps HIV patients, has seen seven patients drop out of the government's HIV programme in Secunderabad... "Patients drop out of the programme for several reasons," said Moorthy. "But this is the first time I am seeing people drop out of the programme because they do not want to give Aadhaar." Moorthy claims that one sex worker, who stopped getting her medicines because she refused to submit her Aadhaar details, died this year.¹⁷

Irrespective of gender, there have also been instances of data breach from several private service providers. In December 2016, pathology reports of 43,203 Indian patients were left publicly accessible on the internet by a medical services company named Health Solutions.¹⁸ More recently, a network security company has reported documents related to 1.02 million medical studies of Indian patients being publicly available online in late 2019.¹⁹

Such cases of data breach definitely affect all irrespective of one's gender. However, it is important to understand the impact of such a breach on individuals of a marginalised identity compared to others from more privileged identities.

It's very unsafe. Most of these (social media) websites do not have a very strong safety feature on them. Anybody can look at anybody's profile, anybody can prank them. So unless you create a very strong parallel system, it would just be harassing to avail the services that you're talking about. - Shaman Gupta

Harassment and bullying of transgender persons with violent threats and/or sexual remarks on social media platforms are quite common when they are open about their gender identity.

¹⁷ Rao, M. (2017, November 17). Why Aadhaar is prompting HIV positive people to drop out of treatment programmes across India. Scroll. Retrieved from <https://scroll.in/pulse/857656/across-india-hiv-positive-people-drop-out-of-treatment-programmes-as-centres-insist-on-aadhaar>

¹⁸ Hunt, T. (2016, December 05). 43,203 Indian patient pathology reports were left publicly exposed by Health Solutions. Retrieved from <https://www.troyhunt.com/43-203-indian-patient-pathology-reports-were-left-publicly-exposed-by-health-solutions/>

¹⁹ Greenbone. (2019, November 17). Information Security Report: Unprotected patient data in the Internet – a review 60 days later, or The Good, the Bad, and the Ugly. Retrieved from https://www.greenbone.net/wp-content/uploads/Greenbone_Security_Report_Unprotected_Patient_Data_a_Review.pdf

Instances of violence and threat to violence against transgender persons are common on social media apps and platforms. This makes it dangerous for transgender persons to disclose their gender status on different social media platforms. Online privacy therefore continues to be a serious concern for them.

If you are talking about Big Data where you are using social media and generating a lot of data, I would be very wary as it is an invasion of privacy. Like all data, its users need to be restricted. It cannot be 'free for all'. - Pawan Dhall

Only individuals who are comfortable with being open about their gender identity online will be comfortable with their social media identities being used, notes Rebina Subba.²⁰ Since many are closeted about their gender identity, many transgender persons are uncomfortable with disclosing their gender identity on social media.

If I am a homebound trans woman, I might use social media to express my feelings through a Facebook account under a female name and identity, then I cannot claim publicly that I am that person. - Grace Banu²¹

Transgender individuals who may not be out as being transgender to family and friends, worry about their gender identity being disclosed. Given the different kinds of privacy challenges faced by a minority group, often many of them have multiple social media accounts to protect their identity from being disclosed. Such multiplicity of accounts, coupled with cautious use of social media accounts due to the general online environment of violence towards those identifying beyond gender binary, used by a minority of transgender population, who are digitally literate and can afford digital devices, makes the resultant social media data woefully inadequate to meaningfully represent the development needs and challenges of transgender persons in India.

4. Discussion

Ignoring the existing access gap faced by marginalised population groups, the digital welfare state is increasing its reliance on data to make welfare decisions. This has led to a growing call for the digital industry to regulate the big data generated from its users. This user generated data regulation by private digital players moves into the ambit of 'identify, surveil, detect, target and

²⁰ Rebina Subba is a social justice lawyer working with marginalized communities since 2008. She is the founder of 'Shamakami – One Who Desires One's Equal,' the only registered organization working on LGBTQI issues in Shillong. She has been working to make people aware of sexuality and gender issues.

²¹ Grace Banu is a dalit and transgender activist and writer. She is the Founder Director of Trans Rights Now Collective.

punish’, as described by Professor Philip Alston.²² With sufficient namesake regulation, private players are given a free rein to collect data on users to support their profit motive, without any consideration or with superficial consideration for human rights.

In his report to the UN General Assembly in October 2019, Alston notes,

*In response to growing calls for effective governmental regulation, the industry has gone into high gear in producing, influencing and embracing “codes of ethics” and other non-binding standards purporting to “regulate” digital technologies and their developers. Most, but by no means all, of these codes contain a reference to human rights, but the substance of human rights law is invariably lacking. Instead the token reference to human rights serves only to enhance claims to legitimacy and universality.*²³

This is predominantly the approach adopted by private service providers towards gender inclusion in a feeble attempt to cater to the needs and requirements of transgender people, a marginalised population group. As described by Crawford, this superficiality and tokenism perpetuate ‘hidden biases’ against gender minorities in the data generated by private sector service providers.²⁴ This has also been observed by Rena Bivens in the context of continued latent binary gendering of Facebook’s user base despite introducing 56 gender options beyond the binary. Although seemingly a progressive move, Facebook’s gender data continues to ‘misgender users when it translates those identities into data to be stored in the database’.²⁵ Bivens notes that despite the introduction of 56 options, the Facebook sign-up page continues to be in gender binary since users are required to first identify within the binary before they can access the non-binary options. In addition, the data collection of individuals within binary genders highlights the continued emphasis of the private sector on binary gendering to drive its commercial agenda including targeted advertising. This is in contrary to the state’s development agenda for the inclusion of transgender persons.

Coupled with the superficial advocacy for diversity and inclusion, data systems of private players are also designed to heighten the need to prove one’s identity against datasets with

²² Office of the High Commissioner, Human Rights, United Nations. (2019, October 17). World stumbling zombie-like into a digital welfare dystopia, warns UN human rights expert. Retrieved from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25156>

²³ See Footnote 1. Page 13.

²⁴ Crawford, K. (2013, April 1). *The Hidden Biases of Big Data*. Harvard Business Review. Retrieved from <https://hbr.org/2013/04/the-hidden-biases-in-big-data>

²⁵ Bivens, R. (2016, January 27). Programming Violence: Under a Progressive Surface, Facebook’s Software Misgenders Users. Retrieved from <https://renabivens.com/programming-violence-under-a-progressive-surface-facebooks-software-misgenders-users/>

government-issued identity documents. This is an additional pressure on transgender persons to prove their existence. However, producing valid identity documents does not guarantee fair representation in the data produced since most private sector services providers do not have provisions for the inclusion of transgender persons in their information management systems. The inability to prove one's identity in a system that is non-inclusive by design, leads to misrepresentation and under-counting of transgender persons by private sector services. The design of private data systems is not presently equipped to avoid this misrepresentation.

Further, the 'digital welfare state's' increased dependency on 'data as evidence' to prove human existence that consequently drives welfare decisions, is drastically diminishing the emphasis on human rights, resulting in bureaucratic erasure of historically marginalised population groups. As discussed in Part 3 of this Report, the lack of data created by public data systems, designed with 'hidden biases' is being used as evidence by different Indian states to grossly under-represent transgender populations, leading to a bureaucratic erasure of their existence. This structural design does not take into consideration the historic and the resultant systemic discriminations experienced by a marginalised group, in order to enter these data sets, although entering these data sets does not guarantee access to welfare or their rights.

The present system does not consider the harassment that transgender persons may be subject to, in order to enter these data systems. However, the present digital welfare state places the onus on vulnerable population groups to prove their existence as individuals and consequently, as a population group to be considered for a budget allocation, and a 'probable' access to welfare benefits. This shift of responsibility from the state to the individual is a regression from human rights and the state's role in fulfilling the constitutionally promised right of every individual. The inability to prove or validate their existence of any individual is resulting in a steady trend of erasure, of both individuals from marginalised identities and these marginalised identities collectively as population groups. The tendency to write off a population group due to lack of available data regarding the group concerned reiterates the need to move away from the practice of insisting for data to make welfare decisions for marginalised groups. Instead, the focus of the state should be to adhere to human rights standards to offer welfare to all.

Appendix: Questions on digital technologies and data challenges

Below is a set of questions that were part of the longer questionnaire that structured the interviews with respondents of this study, and that are relevant for the analysis presented in this part of the report.

- How do you think non-binary or third gender identifying trans and intersex individuals want to be included in the enumeration process, and represented in resultant databases, so that they can effectively access services and lead dignified public lives?
- How do you think gendering of development data affects allocation of development funds for different development projects? Do you think not being included in government databases, or being recorded with incorrect information about your preferred name, gender, or other details, prevents trans/intersex people from accessing government services and welfare payments?
- How does this vary depending on their specific identity within or outside the binary?
- What key digital databases do trans/intersex interact with when interacting with government and private sector service providers (healthcare, HIV, transport, banking, etc.), and how do they get recorded/represented in such digital databases?
- What challenges/vulnerabilities are posed on trans/intersex people as they become included/recorded in specific digital databases, and again specific identification numbers/processed?
- Do you know if trans/intersex people deny/avoid using specific identity documents or identification processes when accessing specific services due to worries/concerns regarding being recorded/represented against those identity documents/numbers? (Are people uncomfortable using IDs? Why so?)
- How do you think your 'digital footprints' and/or social media identities/conversations, can be used to better access public/private services? (that is, can it be easier to access public/private services if one is represented by one's 'digital footprints' and online conversations/interactions instead of data collected by government agencies?)